TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1240.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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FILED OCTOBER 22, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 At a circuit court of the United States for the district of West Virginia continued and held at Parkersburg, in said district, on the 19th day of June, 1884, the following order was made and entered of record, to wit:

Upon an Appeal.

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF WEST VIRGINIA.

This day the plaintiff, The Baltimore & Ohio Railroad Company, by Caleb Boggess, Esquire, its counsel, presented to the court an authenticated copy of the record in the above-entitled cause from the circuit court of Marshall county, in this district; and on motion it is ordered that said record be filed and said cause be docketed in this court for further proceedings to be had therein.

The record referred to in the foregoing order is in words and figures following, to wit:

Record.

Pleas before the circuit court of Marshall county on Wednesday, the 2nd day of April, 1884.

Be it remembered that heretofore, to wit, on the 4th day of December, 1883, came The Baltimore and Ohio Railroad Company and filed its petition in the clerk's office of said circuit court with the clerk thereof, which petition is in the following words and figures:

2 To the honorable circuit court of Marshall county, West Virginia:

Your petitioner, The Baltimore and Ohio Railroad Company, respectively represents that it is aggrieved by an order of the Board of Public Works of West Virginia, and which came to the knowledge of your petitioner on the sixth day of November, 1883, whereby the said Board of Public Works assessed and fixed the value of the property of your petitioner within the said county of Marshall, in the said State of West Virginia, for taxation for the year 1883 at the sum of eight hundred and thirty-five thousand six hundred and three dollars, and from the said assessment and valuation so ordered by the said Board of Public Works your petitioner prays an appeal to your honorable court, and that so much of said assessment as includes the Benwood bridge, valued at three hundred and fifteen thousand dollars, be reversed and annulled; and it will ever pray, &c.

THE BALTIMORE & OHIO
RAILROAD COMPANY,
By its Counsel.

And now, at this day, to wit, at a circuit court held in and for the county of Marshall and State aforesaid, on the same day and year first herein mentioned, to wit, on Wednesday, the 2nd day of April, 1884.

In the Matter of an Appeal of THE BALTIMORE AND OHIO RAILROAD COMPANY from an assessment by the Board of Public Works of this State.

This day came The Baltimore and Ohio Railroad Company, by its attorneys, and offered to file a petition for the removal of above matter into the circuit court of the United States for the district
3 of West Virginia, and a bond therewith in the words and figures following:

Petition.

In the Circuit Court of Marshall County, West Virginia.

Your petitioner, The Baltimore and Ohio Railroad Company, a corporation created by the laws of the State of Maryland, respectfully represents that as such corporation it was at the time of the institution of the suit hereinafter named and now is a citizen of the said State of Maryland.

It further represents that its property in the county of Marshall, in the State of West Virginia, was, for the year 1883, appraised and valued for assessment with taxes for the said year by the Board of Public Works of West Virginia at the sum of three hundred and fifteen thousand dollars, and the said board made return of their said valuation to Joseph S. Miller, the auditor of the said State of West Virginia, to be assessed by him as auditor as aforesaid with taxes for the year aforesaid, for the benefit of the State of West Virginia, the said county of Marshall, and from which valuation and assessment your petitioner, in accordance with the provisions of the statute of the said State of West Virginia, appealed to the said circuit court of Marshall county, on the 4th day of December, 1883, and which said appeal is now pending therein as a suit of a civil nature between your petitioner and the said Joseph S. Miller, auditor as aforesaid, and for the use aforesaid

That the matter in dispute therein exceeds in value, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that at the time said suit was commenced the said Joseph S. Miller was, and still is, a citizen of the State of West Virginia, and the County of Marshall was, and still is, a municipal corporation created by law, State of West Virginia.

4 Your petitioner has made and herewith files a bond with good and sufficient security for the entering in the circuit court of the United States for the district of West Virginia, on the first day of the next session thereof, a copy of this record of this said suit, and for paying all costs that may be awarded by the said last-named court if the said court shall hold that the said suit shall have been wrongfully or improperly removed thereto, and prays this honorable court to accept said bond and make an order in said suit to proceed no further therein, and for the removal thereof into the said circuit court of the United States for the district of West Virginia; and your petitioner will ever pray, &c.

STATE OF MARYLAND, }
City of Baltimore, } *ss:*

Samuel S. Spencer, being duly sworn, says that he is second vice-president of the Baltimore and Ohio Railroad Company, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

In witness whereof I have hereunto set my hand and notarial seal this 12th day of March, A. D. 1884.

[SEAL.] MURRAY HANSON,
Notary Public.

Bond.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and Joseph Harris, as sure*ties*, are held and firmly bound to Joseph S. Miller, auditor of the State of West Virginia, and the County of Marshall in the penal sum of one thousand dollars; — the payment whereof, well and truly to be
5 made unto the said Joseph S. Miller, auditor as aforesaid, and said County of Marshall, — representatives and assigns, we bind ourselves, our heirs, successors, and assignees, jointly and severally, firmly by these presents. Whereas the Baltimore and Ohio Railroad Company has filed its petition in the circuit court of Marshall county, State of West Virginia, asking for the removal to the circuit court of the United States in and for the district of West Virginia of a certain case wherein the said Baltimore and Ohio Railroad company is plaintiff, and the said Joseph S. Miller, auditor as aforesaid, and the County of Marshall [are] defendants:

Now the condition of the above obligation is such that if the said Baltimore and Ohio Railroad Company shall enter in the said circuit court of the United States for the district of West Virginia aforesaid, on the first day of its next session, a copy of the record in the said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was improperly removed, and shall do all other things that shall be required by them under the act of March 3, 1875, providing for the removal of causes, then this obligation to be void; otherwise to remain in full force and virtue.

Witness the corporate name of the said Baltimore and Ohio Railroad Company, by Samuel Spencer, its second vice-president, and its corporate seal, and the name and seal of said Joseph Harris on the 12th day of March, A. D. 1884.

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By SAMUEL SPENCER, [SEAL.]
2nd Vice-President.
JOSEPH HARRIS. [SEAL.]

Attest: [SEAL.] W. H. IJAMS, *Secretary.*

6 And the court, being of opinion that, inasmuch as no notice to or summons or rule against any party interested in said appeal has ever been given or issued against or served upon any person,

corporation, or body politic interested in such assessment or appeal, there is no case or proceeding now pending which can be removed to said court, doth refuse to permit the said petition to be filed, and orders that a summons shall issue requiring all persons, corporations, and bodies politic interested in such assessment or appeal to appear before this court on the 1st day of the next regular term and protect their interests.

STATE OF WEST VIRGINIA, }
Marshall County, } *ss:*

I, Arthur O. Baker, clerk of the circuit court of Marshall county and State aforesaid, do certify that the foregoing is a true transcript of the record and proceeding in the matter of an appeal of The Baltimore and Ohio Railroad Company from an assessment by The Board of Public Works of said State of West Virginia, with all things touching the same, as fully and wholly as they now exist among the records of my office.

A. O. BAKER,
Clerk of said Circuit Court.

7 And on another day, to wit, on the 17th day of February, 1886, the following order was made and entered of record, to wit:

BALTIMORE AND OHIO RAILROAD COMPANY
vs.
BOARD [OF] PUBLIC WORKS, &c.

Upon an appeal in relation to assessments of taxes on property in Marshall Co.

The above matter is set down for argument of a motion to remand on March 30th, 1886.

On another day, to wit, on the 24th day of June, 1886, the following order was made and entered of record, to wit:

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
THE BOARD OF PUBLIC WORKS, &c.

In the matter of the appeal docketed in this court from the circuit court of Marshall county, West Virginia, from an assessment by the Board of Public works of this State.

On this 24th day of June, 1886, came the said Baltimore and Ohio Railroad Company, by Caleb Boggess and John A. Hutchinson, its counsel, and the State of West Virginia, by Caldwell and Caldwell, its counsel, having on yesterday made its motion, in writing, to remand this proceeding to the circuit court of Marshall county, West Virginia, and said motion being argued by the counsel aforesaid, for the State of West Virginia and said railroad company, and considered, the court doth sustain said motion, and it is ordered that this proceeding be remanded to the said circuit court of Marshall

county accordingly, and that said railroad company pay the costs incurred in this court.

The said Baltimore and Ohio Railroad Company, considering itself aggrieved by this order remanding this proceeding as
8 aforesaid, prays that it may be allowed a writ of error to and supersedeas of said order, and also that it may be allowed an appeal from said order, which writ of error and supersedeas and which appeal are both allowed to said company accordingly; but this order allowing such writ of error and supersedeas and appeal is not to take effect until said company, or some one for it, execute a bond in the penalty of five hundred dollars with good security, conditioned according to law, to be approved by one of the judges of this court and filed according to law.

And on another day, to wit, on the 23rd day of June, 1886, the following writ of error was filed in the office of the clerk of the circuit court of the United States for the district of West Virginia:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The Baltimore and Ohio Railroad Company, complainant, and The Board of Public Works of the State of West Virginia, defendant, a manifest error hath happened, to the great damage of the said complainant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that
9 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23rd day of June, in the year of our Lord one thousand eight hundred and eighty-six.

L. B. DELLICKER.
Clerk of the Circuit Court of the United States for the District of West Virginia.

Allowed by—
MORRISON R. WAITE,
Chief Justice of the U. S.

And on another day, to wit, on the 16th day of August, 1886, the

following bond was filed in the office of the clerk of the circuit court of the United States for the district of West Virginia:

Know all men by these presents that we, The Baltimore and Ohio Railroad Company and John Adair and Chas. H. Shattuck, are held and firmly bound unto The Board of Public Works of [the] State
10 of West Virginia in the full and just sum of five hundred dollars, to be paid to the said Board of Public Works of the State of West Virginia, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a circuit court of the United States for the district of West Virginia, in a suit depending in said court between The Baltimore and Ohio Railroad Company, complainant, and The Board of Public Works of the State of West Virginia, defendant, a decree and judgment was rendered against the said complainant, and the said complainant having prosecuted a writ of error and an appeal from said final decree and judgment to the Supreme Court of the United States, and having obtained an appeal and writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the decree and judgment in the aforesaid suit, and a citation directed to the said Board of Public Works of the State of West Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said The Baltimore and Ohio Railroad Company shall prosecute its appeal and writ of error to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

Aug. 16, 1886.

BALTIMORE AND OHIO R. R. CO.
JOHN ADAIR, *Ag't.* [SEAL.]
JOHN ADAIR. [SEAL.]
C. H. SHATTUCK. [SEAL.]

Sealed and delivered in presence of—

_____ _____.

Approved by—
J. J. JACKSON,
U. S. Dist. Judge.

11 And on another day, to wit, on the 16th day of August, 1886, a citation was issued from the clerk's office of the circuit court of the United States for the district of West Virginia, which citation, with the return thereon, is in words and figures following, to wit:

Citation.

THE UNITED STATES OF AMERICA:

To the Board of Public Works of the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 16th day of August, in the year of our Lord one thousand eight hundred and eighty-six.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

The return thereon is in words and figures following, to wit:

Return.

Served a true copy of the within citation upon E. W. Wilson.

12 THE UNITED STATES OF AMERICA:

To Joseph S. Miller, auditor of the State of West Virginia; The Board of Public Works of West Virginia, and The County of Marshall, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

Return.

Served the within citation this 9th day of October, 1886, at Wheeling, West Virginia, by delivering a true copy thereof to Geo. B.

Caldwell and Alfred Caldwell, of the firm of Caldwell and Caldwell, counsel of record for the said defendants in error.

THOS. P. SHALLCROSS,
Deputy for Columbus Sehon, U. S. Marshal, D. W. Va.

13 President of the Board of Public Works of the State of West Virginia, by serving the same personally upon him as such president at the office of the said Board of Public Works of W. Va., at Charleston, W. Va., this 23rd day of August, 1886.

C. SEHON,
U. S. Marshal, Dist. of W. Va.
J. H. VAN BUREN,
Dep. M.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing is a true copy from the records and papers of my office of the record in the case of The Baltimore and Ohio Railroad Company against The Board of Public Works of West Virginia, lately pending in this court.

In testimony whereof I hereunto set my hand and the seal of said court, at Parkersburg, in said district, this 6th day of September, 1886.

{ Seal Circuit Court United States, District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

14 THE UNITED STATES OF AMERICA:

To Joseph S. Miller, auditor of the State of West Virginia; The Board of Public Works of West Virginia, and The County of Marshall, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 8th day of October in the year of our Lord one thousand eight hundred and eighty-six.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

15 [Endorsed:] B. & O. R. Co. *v.* Jos. S. Miller, &c. Citation.

Served the within citation this 9th day of October, 1886, at Wheeling, W. Va., by delivering a true copy thereof to Geo. B. Caldwell and Alfred Caldwell, of the firm of Caldwell and Caldwell, counsel of record for the said defendants in error.

THOS. P. SHALLCROSS, *Dep'y*,
For COLUMBUS SEHON,
U. S. Marshal, Dist. W. Va.

Marshal's fees, $9.32.

Endorsed on cover: West Virginia C. C. U. S. No. 1240. The Baltimore & Ohio Railroad Company, plaintiff in error and appellant, *vs.* The Board of Public Works of the State of West Virginia. Filed October 22, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1886.

NO. 1240.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Plaintiff in Error and Appellant,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR AND APPELLEES.

ALFRED CALDWELL, COUNSEL.

WHEELING:
WEST VIRGINIA PRINTING CO., PRINTERS.
1886.

Supreme Court of the United States.

OCTOBER TERM, 1886.

NO. 1240.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Plaintiff in Error and Appellant,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR AND APPELLEES.

ALFRED CALDWELL, COUNSEL.

WHEELING:
WEST VIRGINIA PRINTING CO., PRINTERS.
1886.

STATEMENT OF CASE.

This case is an appeal from the assessment made by the Board of Public Works of the State of West Virginia on property in the county of Marshall, in such State.

The assessment for taxation of railroad property in West Virginia is made under and in pursuance of the 67th section of chapter 29 of the code of that State, as amended by chapter 52 of the acts of the legislature of the year 1883.

The portion of such section which it is deemed necessary to consider in the decision of this case is as follows:

"67. The president, vice president, secretary or principal accounting officers of any corporation or company owning or operating a railroad, or railway, wholly or in part within this State, for the transportation of freight or passengers, or both, for compensation, shall make a return in writing to the auditor on or before the first day of April in each year, which shall be signed and sworn to by one of said officers, showing in detail the following particulars for the year ending on the thirty-first day of December next preceding, viz:

First—The whole number of miles of railroad owned, operated or leased by such corporation or company within this State.

Second—If such road so owned, operated or leased by such corporation or company be partly within and partly without this State, the whole number of miles thereof within this State, and the whole number of miles without the same, including its branches in and out of the State.

Third—Its railroad track in each county in this State through which it runs; giving the whole number of miles of road in the county, including the track and its branches, and side and second tracks, switches and turnouts therein, and the fair cash value per mile of such railroad in each county, including in such valuation such main tracks, branches, side and second tracks, switches and turnouts.

Fourth—All its rolling stock; giving a detailed statement of the number of cars, including passenger, mail, express, baggage, freight and other cars of

every description, and the fair cash value of all such cars used wholly, or in part in this State, distinguishing between such as are used wholly in this State and such as are used partly within and partly without the State; the whole number of engines, including their appendages, used wholly or in part within this State, distinguishing between such as are used wholly within this State and such as are used partly within and partly without the same, and the fair cash value of such as are used wholly within the State, and such as are used partly within and partly without the State; and the proportional value of such cars and engines used by it partly within and partly without the State, according to the time used and the number of miles run by such cars and engines in and out of the State; and the proportional cash value thereof to each county in this State within which such railroad runs.

Fifth—Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it, and the fair cash value of all buildings and structures, and all such machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this State in which it is located.

Sixth—Its personal property of every kind whatsoever, including money, credits, investments, wholly held or used in this State, showing the amount and value thereof in each county.

Seventh—Its actual capital stock and the number, amount and value in cash thereof; the amount of its capital stock actually paid in; the total amount of its bonded indebtedness, and of its indebtedness not bonded; its gross earnings for the year, including its earnings from its telegraph lines, which shall be stated separately, on the whole length of its road, including the branches thereof, in and out of the State and also such earnings within this State on way freight and passengers, and the proportion of such earnings in this State on through freight and passengers carried over its lines in and out of the State, to be ascertained by the number of miles the same were carried by it within and the number of miles without the State.

Eighth—Its gross expenditure for the year, giving a detailed statement thereof under each class or head of expenditure.

If any corporation or company fail to make such return to the auditor as herein required, it shall be guilty of a misdemeanor and fined one thousand dollars for each month such failure continues.

Prosecution for such failure shall be in the county wherein the seat of government is. If such return be made to the auditor, he shall lay the same, as soon as practicable thereafter before the board of public works; and if such return be satisfactory to the board it shall approve the same, and by an order entered upon its records, direct the auditor to assess the property of

such corporation or company, with taxes, and he shall thereupon assess the same as hereinafter provided. But if such return be not satisfactory to the board, or if any such company fail to make such return as herein required, said board of public works shall proceed in such manner as to it may seem best to obtain the facts and information required to be furnished by such return; and to this end the said board may send for persons and papers, and may compel the attendance of any person and the production of any paper necessary, in the opinion of said board, to enable it to obtain the information desired for the proper discharge of its duties under this section.

Any expenses necessarily incurred by said board in procuring such information shall be paid by the governor out of the contingent fund.

If any person shall refuse to appear before said board when required by it to do so, as aforesaid, or shall refuse to testify before said board in regard to any matter as to which said board may require him to testify, or if any person shall refuse to produce any paper in his possession or under his control, which said board may require him to produce, every such person shall be guilty of a misdemeanor, and fined five hundred dollars, and shall be imprisoned not less than one nor more than six months, at the discretion of the court. Prosecutions against any such person shall also be in the county wherein the seat of government is. As soon as possible, after the board of public works shall have procured the necessary information to enable it to do so, said board shall proceed to assess and fix the fair cash value of all the property of said corporation or company hereinbefore required, to be returned by it to the auditor, so far as the said board has been able to ascertain the same, in each county through which the railroad of any such corporation or company runs. In ascertaining such value the board shall consider any return which may have been previously made to the auditor by such corporation or company, and all the evidence and information it has been able to procure by the means aforesaid, and all such as may be offered by such corporation or company. And the decision of said board thereon made shall be final, unless the same be appealed from within thirty days after such decision comes to the knowledge of the president, vice president, secretary, or principal accounting officer, or the attorney of such corporation or company transacting business for it in the county wherein the seat of government is, in the manner following: Any corporation or company claiming to be aggrieved by any such decision, may, within the time aforesaid, appeal therefrom as to the assessment and valuation made within each county through which its road runs, to the circuit court of such county; and such appeal shall have precedence over all other cases on the docket of such court, and be tried in the shortest time possible after such appeal is docketed. The court shall hear all such legal evidence on such appeal as may be offered by the state, county, district or municipal corporation, and by the corporation or company taking such appeal. And if the court be satisfied that the value so fixed is correct, it shall confirm the same; but if it be satisfied that the value so fixed by said board is either too high or too low,

the court shall correct the valuation so made, and ascertain and fix the true value of such property according to the facts proved, and certify such value to the auditor. In case the lists and valuations of the property filed with the auditor as aforesaid, be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made by the board of public works as aforesaid, the auditor shall immediately certify to the county court of each county through which such railroad runs, the value of the property therein of every such company as valued or assessed as aforesaid, and it shall be the duty of such court to apportion the whole of such value between such districts and independent school districts in their county through which said road runs, as near as may be according to the value thereof, and then a proportional valuation to each municipal corporation in their county through which said road runs according to the value thereof. It shall be the duty of the clerk of the county court of every county through which any railroad runs, within thirty days after the county and district levies are laid by such court, to certify to the auditor the apportionment made by the county court as aforesaid, and the amount levied upon each one hundred dollars value of the property in the county for county purposes, and on the value of the property in each magisterial district through which such railroad is located, for district purposes.

It shall also be the duty of the secretary of the board of education of every school district and independent school district through which the railroad runs, in each county, within thirty days after the levy is laid therein for free school and building purposes, or either, to certify to the auditor the amount so levied on each one hundred dollars value of the property therein for each of said purposes; and it shall be the duty of the recorder, clerk or other recording officer of every municipal corporation, through which such railroad runs within the same time after a levy is laid therein for any of the purposes authorized by law, to certify to the auditor the amount levied upon each one hundred dollars value of the property therein for each and every purpose. Any clerk of a county court, secretary of a board of education, or recorder, clerk or other recording officer of a municipal corporation, who shall fail to perform any of the duties herein required of him shall be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars.

In case of the failure of any such officer to furnish to the auditor the certificate herein required, the auditor may obtain the rate of taxation for any of said purposes from the copies of the land books on file in his office, if the same be found in such books, and if not, in such other way or manner as he may deem necessary or proper for the purpose. As soon as possible after the value of the property of such corporation or company is fixed by the board of public works, or by the circuit court on appeal as aforesaid, and after he shall have obtained the information herein provided for to enable him to do so, the auditor shall assess and charge the property of every such corporation or company with the taxes properly chargeable thereon, in a book to be kept by him for that purpose, as follows:

First—With the whole amount of taxes upon its property for state and state school purposes.

Second—With the whole amount of taxes on its property, in each county through which its road runs, for county purposes.

Third—With the whole amount of taxes on its property in each magisterial district through which its road runs, for road and other district purposes other than free school and building purposes.

Fourth—With the whole amount of taxes on its property in each school district and independent school district through which its road runs, for free school and building purposes.

Fifth—With the whole amount of taxes on its property in each municipal corporation through which its road runs, for each and all of the purposes for which a levy therein is made by the municipal authorities of such corporation."

The board of public works, named in the foregoing statute law, is a corporation created by law, *i. e.*, by first section of chapter 56 of the code of West Virginia, which reads as follows:

"1. The governor, auditor, treasurer, superintendent of free schools and attorney general shall be and continue a corporation under the style of 'the board of public works.'"

The Baltimore and Ohio Railroad Company, being dissatisfied with the assessment upon its property in the county of Marshall, made by the Board of Public Works of the State for the year 1883, pursuant to the statute aforesaid, appealed as authorized by such statute to the circuit court of the State in said county.

The Railroad Company commenced its proceedings on appeal by filing a petition in the clerk's office of the circuit court of Marshall county on December 4, 1883, (see record, page one,) and before taking any further steps in the matter or notifying any body politic, corporation or person that it had taken such appeal, the company, on Wednesday, the 2d day of April, 1884, offered to file a petition and bond to remove the proceedings into the circuit court of the United States for the district of West Virginia, (record page 2), claiming the right to such removal by virtue of the act of Congress of March 3, 1875, because, as it alleged, it was a

corporation of the State of Maryland; the said appeal was a suit of a civil nature between said company and Joseph S. Miller, auditor of the State of West Virginia and a citizen thereof; the matter in dispute exceeded in value, exclusive of costs, the sum or value of five hundred dollars, and the controversy in such appeal was a suit between citizens of different States. (Record, page 2.) The circuit court of Marshall county refused to permit the petition to be filed and ordered a summons to issue against all persons, corporations and bodies politic interested in such assessment or appeal to appear on the first day of its next regular term to protect their interests. (Record, pages 3 and 4.)

On the 19th day of June, 1884, the railroad company filed in the circuit court of the United States, for the district of West Virginia, a copy of the record of the proceedings upon its appeal in the Marshall county circuit court, and the cause was docketed for further proceedings. (Record, page 1.)

On June 24th, 1886, the said circuit court of the United States, on motion of the State of West Virginia, remanded the proceedings in the Marshall county appeal to the circuit court of that county and adjudged the costs incurred in the United States court against the company, granting the company at the same time both a writ of error and an appeal from the order remanding, to the Supreme Court of the United States. (Record, pages 4 and 5.)

ARGUMENT.

It is respectfully contended that this case was properly remanded to the State court for five distinct reasons, viz:

First. The Baltimore and Ohio Railroad Company, in so far at least as the matters involved in this case are concerned, was when the same was instituted and when the petition for removal was filed, and it ever since has been a corporation of the State of West Virginia and a citizen, within the meaning of the removal act of Congress, of the same State as all the other persons, corporations and bodies politic interested in such case.

Second. This case is not a suit of a civil nature at law or in equity.

Third. In this case the matter in dispute does not exceed, exclusive of costs, the sum or value of five hundred dollars.

Fourth. If this case can be held to be a suit of a civil nature either at law or in equity, the State of West Virginia is a necessary and indispensable party defendant therein, and the suit is not between citizens of different States, for the State of West Virginia is not a citizen of any State.

Fifth. There was no suit *pending* within the meaning of the act of Congress when the removal was attempted by the Company.

CITIZENSHIP.

The question of the right of the Baltimore and Ohio Railroad Company to remove suits in which it is a party, brought by or against citizens of the state of West Virginia, from the state courts to the Federal Court, has long been a vexed one, decided against the right by the state courts and in favor of

its existence by the Federal Circuit Court. The state courts and authorities have almost uniformly claimed and decided that the company is a domestic corporation of the state of West Virginia, and a conflict of jurisdiction has been caused, which it is extremely desirable, in the interest of the people of the state, to have finally and conclusively settled. In the views of many, and I think I can safely say of most of the legal profession on the bench or at the bar in West Virginia the question, whether the Baltimore and Ohio Railroad Company is a Maryland corporation only and as such entitled to remove suits, in which it is a party, to the Federal Court from state courts, is still unsettled.

The removal of suits by this company from the state courts to the Federal Court has been of incalculable injury to the people of West Virginia, and, if unjustified by law, this evil can only be prevented by a decision of the highest tribunal in the nation, the Supreme Court of the United States. In order that the subject may be finally put at rest, as the representative of the people of West Virginia, I respectfully but earnestly urge the Court, if in its opinion it can properly do so in this case, to finally settle this question which has so long been a distressing cause of discontent to the people of the state by reason of the uncertainty which surrounds it, produced by the conflict between the decisions of the state and federal courts.

I can add nothing by way of illustration of the effect of these removals of suits by this company to what is said by Judge Johnson or the Supreme Court of Appeals of West Virginia in announcing the opinion of that court in the case of the B. & O. Railroad Co. vs. The P., W. & Ky. Railroad Co., 17 W. Va. 812. In that case the judge said, at page 878:

"The hardship of regarding the Baltimore & Ohio Railroad Co. not liable to suit in the courts of West Virginia, as pointed out by Mr. Justice Swayne in Railroad Co. vs. Harris, would be no less, if cases brought in the state courts against the company, could be removed to the Federal Court. It would in many cases amount to a denial of justice. For instance, an action

is brought against the company in Jefferson county for a sum exceeding $500.00. The plaintiff is a poor man and has suffered an injury from the railroad; his witnesses reside in the county; he can without trouble secure their attendance there; he has some show of a speedy trial, for there are three terms of a state court in a year; but the case is removed into the circuit court of the United States. That court sits at Parkersburg, *three hundred* miles from the home of the plaintiff. The court sits but twice a year. He is compelled to pay the fare of all his witnesses on the defendant's road for three hundred miles, if he is able to do it; if not, justice is denied him. He may take them, once, twice or thrice, and the case may be continued. He has suffered in expense perhaps more than his claim will amount to. On the other hand, the railroad company transports its witnesses without charge at any time it pleases, and is actually reaping a profit out of the poor man, who is compelled to pay the railroad company for transporting his witnesses. If such is the law, it is hard and unjust. It has not yet been so held; and it seems to me, it never can be."

For much of my argument on the question of the citizenship of the Baltimore and Ohio Railroad Company, I am indebted to briefs of fellow members of the bar, filed in other cases.

For the purposes of jurisdiction, a corporation is conclusively presumed to be a citizen of the State which created it. Its citizenship then depends on the legislation under which it was formed. The charter of the Baltimore and Ohio Railroad Company is a public act of which the court takes judicial notice; Hart vs. B. & O. R. R. Co., 6 W. Va., 336; State vs. B. & O. R. R. Co., 15 W. Va., 392; Mahaney vs. Kephart, 15 W. Va., 624.

By reference to the Maryland session acts of 1827, an act will be found to have passed on the 27th of February of said year, providing for the incorporation of the Baltimore and Ohio Railroad Company, and by reference to the acts of the General Assembly of Virginia, of 1826–27, an act will be found to have passed March 8th, 1827, reciting the Maryland act, and providing for the incorporation of the Baltimore and Ohio Railroad Company in Virginia. It will be seen on examination of the two acts of 1827, that the Maryland corporation was not in existence when the Virginia act of March 8th, 1827, was passed.

The subscribers to the capital stock of the Baltimore and

Ohio Railroad Company became a corporation under both acts at the same time, that is as soon as ten thousand shares, or one million of dollars of the capital stock of the company were subscribed in the manner specified in those acts. By the first section of the Maryland act of 1827, commissioners were named to open books at such times and places as they might direct, for the purpose of receiving subscriptions to the capital stock of the B. & O. R. R. Co., after having given notice of the times and places of opening the same, which books were to be kept open for at least ten successive days from the first opening of the same. And if the amount necessary for the incorporation of the company should not have been subscribed during the ten days, the commissioners were authorized to re-open the subscriptions from time to time for twelve months thereafter, until the sum necessary should be subscribed.

The first section of the Maryland act is as follows:

"1. Be it enacted by the General Assembly of Maryland, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKim, Junior, William Stewart, Talbot Jones, Rosewell L. Colt, George Brown and Evan Thomas, be and they are hereby appointed commissioners, under the direction of a majority of whom, subscriptions may be received to the capital stock of the Baltimore and Ohio Railroad Company, hereby, incorporated: and they, or a majority of them, may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given notice of the times and places of opening the same, as they may deem proper; and that upon the first opening of said books, they shall be kept open for at least ten successive days, from 10 o'clock A. M. to 2 o'clock P. M., and if at the expiration of that period, such a subscription to the capital stock of said company, as is necessary to its incorporation, shall not have been obtained, the said commissioners, or a majority of them, may cause the said books to be opened from time to time, after the expiration of the said ten days, for the space of twelve months thereafter, or until the sum necessary to the incorporation of the company shall be subscribed, if sooner subscribed: and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them, by this act, another may be appointed in his stead, by the remaining commissioners, or a majority of them."

The second section is as follows:

"And be it enacted, that the capital stock of the Baltimore and Ohio

Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the State of Maryland, and five thousand for the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporations or by individuals; and that as soon as *ten thousand shares of the said capital stock shall be subscribed, the subscribers of the stock, their successors and assigns, shall be and they are hereby declared to be incorporated into a company by the name of the Baltimore and Ohio Railroad Company*, and by that name shall be capable in law of purchasing, selling and conveying estates, real, personal and mixed, so far as may be necessary for the purposes hereinafter mentioned and forever, and shall have perpetual succession, and by said corporate name may sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure, and shall have, enjoy, and may exercise all powers, rights and privileges which other corporate bodies may do, for the purpose mentioned in this act." The fifth section provided, "that if the subscription herein made necessary to the incorporation of the said company, shall not be obtained within twelve months after the first opening of the subscription books by the said commissioners, this act and all the subscriptions under it shall be null and void."

The act of the General Assembly of Virginia passed March 8th, 1827, is entitled "An act to confirm a law passed at the present session of the General Assembly of Maryland, entied, 'An act to incorporate the Baltimore and Ohio Railroad Company.'" (Va. Sess. Acts 1826–27, page 77.)

After the title and date of passage, this act proceeds:

"Whereas, an act has passed the legislature of Maryland, entitled 'An act to incorporate the Baltimore and Ohio Railroad Company,' in the following words and figures, viz.:" (here the Virginia act sets out the Maryland act in full, and then proceeds, as follows:)

"SEC. 1. *Therefore be it enacted by the General Assembly*, that the same rights and privileges shall be and are hereby granted to the aforesaid company, within the territories of Virginia, as are granted to them within the territory of Maryland.

The said company shall be subject to the same pains and penalties and obligations as are imposed by said act, and the same rights, privileges and immunities which are reserved to the State of Maryland, to the citizens thereof, are hereby reserved to the State of Virginia and her citizens; except that the said company shall not make or authorize to be made any lateral roads within the territory of Virginia, without the consent of this legisla-

ture ; that the said road shall not strike the Ohio at a point lower than the mouth of the Little Kanawha, on said river."

If as soon as ten thousand shares of the capital stock were subscribed the subscribers became entitled to the rights and privileges and subject to the obligations of a body corporate, within the territory of Maryland, they became at the same time entitled to the same rights and privileges and subject to the same obligations of a body corporate within the territory of Virginia. Let us apply the Virginia law some what in detail. What rights and privileges were granted to the subscribers of the said capital stock, their successors and assigns?

1. "To be incorporated into a company by the name of the Baltimore and Ohio Railroad Company."

The same privilege is then granted them within the territory of Virginia.

2. "By that name shall they be capable in law of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, so far as shall be necessary for the purpose hereinafter mentioned, and no farther."

The same right with the same limitation is granted them within the territory of Virginia.

3. "And shall have perpetual succession."

Virginia grants the same privilege within her territory.

4. "And by said corporate name may 'sue and be sued.' "

Virginia grants the same right to and reserves to herself and her citizens the same right of suing which the state of Maryland has reserved to herself and her citizens.

5. "And may have and use a common seal."

This privilege is granted alike by Maryland for her territory and by Virginia for hers.

6. "And shall have, enjoy and may exercise all the powers, rights and privileges which other corporate bodies may lawfully do, for the purpose mentioned in this act."

All this may be done within the territory of Virginia as effectually as within the territory of Maryland. And so we might go through with the Maryland law. The Virginia statute, in all essential particulars, follows the Maryland law,

and makes it law within and for the territory of Virginia.

The Baltimore and Ohio Railroad Company was to be put upon substantially the same footing within the territory of each State. The Virginia act of March 8th, 1827, was therefore, we take it, an act of incorporation. No precise form of expression is necessary to make a corporation by legislative enactment. It is not necessary that the word "incorporate," "found," "erect," or "establish," should be used, and this has been the rule from the earliest times of the common law. Comyns Dig. Tit. Franchises, F. 6; 2 Kent's Com., (276); The Conservators of the river Tone v. Nash, 10 B & Cres., 349.

The Maryland act was passed on the 27th day of February, 1827, and on the ninth day thereafter, i. e., on March 8th, 1827, the General Assembly of Virginia passed "an act to *confirm*" the Maryland law. As before stated, the Maryland law had established no existing corporation when the Virginia act was passed, for the corporation was only created by the terms of the Maryland law when ten thousand shares of the capital stock were subscribed. The subscribers, their successors and assigns, then became a corporation. But if such shares were not subscribed for within twelve months from the opening of subscription books, the act and subscriptions under it became void. By the requirements of the Maryland law the commissioners were to keep open subscription books for at least ten successive days from the first opening of the same. The ten days during which subscription books were to be kept open could not have expired when the Virginia act was passed. Had the Virginia act been introduced and rushed through the General Assembly upon the day of its passage, that day was only the ninth day after the passage of the Maryland law. It may fairly be inferred that the fact was, as it is understood to have been, that the ten thousand shares had not been subscribed when the Virginia act was passed, and that there was no corporation then in existence. This being a matter of public history connected with the chartering of this great public work, the court might take judicial

notice thereof. Hart vs. Baltimore & Ohio R. R. Co., 6 W. Va., 359.

There being no corporation in existence, the act of Virginia was not simply an enabling act or license to a railroad corporation. It was intended as an act to give life and vitality to a projected corporation. The title of the Virginia act indicates this, and the title of an act is for the express purpose of showing its object. It does not pretend to license a Maryland corporation, but in the title says, it is "to *confirm*" the Maryland act. To confirm, according to Webster, is "to make firm, or more firm; to add strength to; to strengthen; to fix; to ratify; to assent to," &c. *Everything* in the Maryland act then was strengthened, made firm and ratified by the Virginia law. The intent of the General Assembly of Virginia to do this is unmistakably manifested by the title of their act. It is the intent of the Virginia legislators which governs the question under consideration.

The Virginia act was to confirm, ratify and strengthen the authority of certain gentlemen, named in the Maryland act, to be commissioners to open books of subscription to the capital stock of the projected corporation. It next was to confirm, fix and assent, that when ten thousand shares should be subscribed, the subscribers, their successors and assigns, should be a corporation. The Virginia act made such subscribers a corporation, not of Maryland alone, but a corporation by virtue of Virginia law, and necessarily a corporation of the State of Virginia.

The form of the act is immaterial, it is the intent of the law-makers that is to be discovered, and the title and contents of the Virginia law indicates an intent to charter a corporation, as fully as if the Maryland act had been re-enacted in terms by the Virginia assembly.

The learned counsel for the railroad company in their argument in the Railroad Company vs. Harris, 12 Wall., on page 74, agree that the Virginia act was an act of incorporation.

Subsequent to the passage of the act of March 8th, 1827, numerous acts were passed in Virginia in relation to the railroad company, most all of them, however, unimportant in this case. Several of these acts are mentioned in the following quotation from the opinion in the case of the B. & O. R. R. Co. vs. Supervisors, 3 W. Va. 322 et seq.:

"In 1836, 1837, 1838 and 1839 other acts were passed by Virginia authorizing conditional subscriptions to the work of the company, the act of 1838 also extending the time for the completion of the work in Virginia until the 4th day of July, 1843, upon the conditions mentioned in said act. The conditions mentioned in these several acts were never complied with, nor the subscriptions, therein provided for, made; but the road was nevertheless completed in 1843 as far as Cumberland. The work upon the road in Virginia, between Harper's Ferry and Cumberland, must have been done after the time limited in the charter without any extension thereof, except the extension mentioned in the act of 1838, which never took effect, because it was dependant upon conditions never complied with.

In 1844-45 and in 1845-46 other acts were passed proposing terms and conditions upon which the company might complete its road through Virginia, but neither of these acts was accepted by the company.

On the 6th of March, 1847, another act was passed which was accepted by the company, and under which the company completed its road through Virginia, subject to such parts of its original charter as remained unaltered."

The first, sixth and eleventh sections of the said act of March 6th, 1847, are as follows:

"1. *Be it enacted by the General Assembly*, That the Baltimore and Ohio Railroad Company be, and they are hereby authorized to complete their road through the territory of this commonwealth, so as to pass from a point in the ravine of Buffalo creek, at or near the mouth of Pile's fork, to a depot to be established by said company on the northern side of Wheeling creek in the city of Wheeling in Ohio county, by such route as upon minute estimates to be made after full examinations and instrumental surveys of the feasible or practicable routes, shall appear to be the cheapest upon which to construct, maintain and work said railroad; which estimates shall be made on like principles and plans, in like manner and upon as great respective amounts of trade and travel as were adopted and employed in the comparative estimates of the company's chief engineer, laid before the meeting of the stockholders of the said company, held in Baltimore on the twelfth day of July, eighteen hundred and forty-five.

6. *Be it further enacted*, That the said company shall be subject to the provisions of the act of assembly passed on the eleventh day of March eighteen hundred and thirty-seven, establishing general regulations for the

incorporation of railroad companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable:

Provided, That said Baltimore and Ohio railroad company shall not be permitted to charge for transportation or travel to or from Baltimore from or to any point distant more than five miles in a direct line from the Ohio river, more in the aggregate than for transportation or travel from Wheeling to Baltimore, or from Baltimore to Wheeling respectively, nor more in the aggregate from any depot west of Harper's Ferry to Baltimore, or from Baltimore to such depot, than from any other depot more distant from Baltimore to Baltimore, or from Baltimore to such last mentioned depot.

11. *Be it further enacted*, That as a condition upon which the powers and privileges of this act are granted, the said Baltimore and Ohio railroad company shall accept this act within six months, and enter upon the construction of the continuation of their road hereinbefore authorized within three years, and complete the same within twelve years after the passage of this act."

The general railroad law of 1837 of Virginia, referred to in the 6th section of the said act of 1847, may be found in Tate's Digest of the laws of Virginia (762) and in the Session Acts of Virginia 1836–7, ch. 118, and contains the following:

"1. § 1. Whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide. * * *

3. § 4. When the whole of the capital stock of the company, or such portion thereof as the act of incorporation shall authorize, shall have been subscribed, the subscribers, their executors, administrators and assigns, shall be and are hereby declared to be incorporated into a company, with all the rights, privileges and immunities, and subject to all the restrictions and liabilities of a body politic in law; and by their corporate name shall be capable in law of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, so far as shall be necessary for the purposes of their incorporation, and no further. They shall have perpetual succession and power to make and use a common seal; and by their corporate name may sue and be sued; and may make such by-laws, rules and regulations, not inconsistent with the laws of this state, or of the United States, as shall be necessary for well ordering and conducting the affairs of the company.

19. § 20. The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair,

so that it shall fail to afford the intended accommodation to the public for three successive years, then and in that case also their charter shall be annulled as to the company, and the state of Virginia may take possession of the said railroad and works, and the title thereto shall be vested in the said state so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass shall revert to and be vested in the person or persons from whom they were taken, by concession on inquisition as aforesaid, or their heirs or assigns.

22. § 23. All machines, wagons, vehicles or carriages belonging to any company incorporated subject to the provisions of this act, together with all their works, and all profits which shall accrue from the same shall be vested in the respective shareholders forever, in proportion to their respective shares, and shall be deemed personal estate.

23. § 24. So soon as any portion of a railroad constructed according to the provisions of this act, may be in readiness for transportation, it shall be lawful for the president and directors of the company to transport by their officers and agents, or by contractors under them, persons and property on the same, and to charge the following rates of toll: For the transportation of persons, not exceeding six cents per mile for each person, including his baggage, if any, not exceeding one hundred and fifty pounds; for the transportation of goods, produce, merchandize, and other articles, except gypsum and lime, not exceeding eight cents per ton per mile; for the transportation of gypsum and lime not exceeding four cents per ton per mile; and for the transportation of the mail, such sums as they may agree for: Provided, That upon packages or boxes consigned by and to one person weighing in the aggregate less than one hundred pounds, and of no greater dimensions each than two cubic feet, the president and directors may demand a toll not exceeding one cent per mile: Provided however, That in time of war or insurrection, troops or persons in the military or naval service of this state or of the United States, with their arms, munitions and baggage, shall be promptly transported, and for one-half the charge herein allowed, and shall be entitled to a preference over other persons or over goods, produce, merchandise or other articles: And provided further, That the president and directors shall be entitled to demand and receive for the wharfage weighing, storage and delivery of articles at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the towns wherein or nearest to which their depots and warehouses are situated.

24. § 25. The said president and directors may make or cause to be made branches or lateral rail-roads in any direction whatsoever, in connexion with their rail-road, not exceeding ten miles each in length; and shall have, possess, and may exercise in the construction, use and repair of the same, the same rights and powers, and shall be entitled, on the completion of any such branch or lateral rail-road, to the same rights, privileges and immunities, and be subject to the same pains, penalties and obligations

in relation to the same, as are by law prescribed in relation to their principal line of rail-road: Provided, That no branch or lateral rail-road exceeding two miles in length shall be commenced until the expediency of making the same shall have been determined on at a general meeting of the stockholders by two-thirds of all the votes which could legally be given in favor of the same; and that no such branch or lateral rail-road shall be constructed until the main line shall be completed and in use.

25. § 26. So soon as any rail-road to be constructed, subject to the provisions of this act, shall be completed, the president and directors of the company shall semi-annually declare and make such dividend of the net profits from their tolls as they may deem advisable; to be divided among the proprietors of the stock in proportion to their respective shares. When the net profits shall amount to a sum equal to the capital stock expended as aforesaid, with six per centum per annum interest thereon, then the tolls which the president and directors shall be entitled to demand and receive on their rail-road shall be fixed and regulated from time to time by the board of public works, or by such agent or agents as may be appointed by the legislature for that purpose, so as to make them sufficient, in their or his estimation, to yield a nett profit equal to six per centum per annum on the capital stock expended in making and completing the rail-road over and above what may be necessary for the repairs and renewal of the same. The president and directors shall in no case make any dividend exceeding the amount of the net profits actually received, so that the capital stock shall never thereby be impaired; and if they shall make any dividend impairing the capital stock, the directors consenting thereto shall be liable, in their individual capacities, to the company for the amount of capital so divided; and each director present when such dividend is made, shall be adjudged to be consenting thereto, unless he forthwith enter his protest in the minutes of the board, and give public notice to the stockholders of the declaring such dividend.

27. § 28. It shall be the duty of the president and directors of the company to publish a notice of every dividend declared by them, and of the time and place appointed for the payment thereof, in some newspaper printed in the city of Richmond, and in one or more of those printed in or nearest to the town or place in which the prineipal office of the company may be situated.

28. § 29. The company shall not borrow money, for any purpose whatever, without special authority of law, until the whole amount of the capital stock subscribed shall be paid up and expended or appropriated, losses by delinquent or insolvent stockholders excepted: *Provided however*, That if any part of the capital stock shall be unsubscribed, and it shall be necessary to obtain the amount thereof for the completion of the work, they shall have power to borrow the whole or any part of such unsubscribed capital as they may deem necessary; and may make the same convertible into stock of the company at the option of the lender, at any time within one month after the declaration of any semi-annual or other dividend of the profits."

The provisions of the general railroad law of 1837 were intended for domestic corporations. When the Baltimore and Ohio Railroad Company accepted the act of 1847 and built its road in Virginia thereunder, it became subject to requirements of law which apply to domestic companies. Under the railroad law their charter would be annulled, if they abandoned the road or failed to keep it in repair, so as to afford the intended accommodation to the public for three successive years, and the state might take possession of the railroad and works, &c. This provision is certainly applicable to the B. & O. R. R. Co., and means that the Virginia charter would be annulled and the state could take the road within Virginia. The company was not a mere licensed company to do business in Virginia, but its dividends, freight rates, power to borrow money, &c., were all regulated by Virginia law. Whatever may be the construction of the act of March 8th, 1827, after the acceptance of the act of 1847 the company was no longer a foreign corporation in constructing and operating its road in Virginia, at least in so far as such road was constructed after the acceptance. As stated in the opinion in the case of Hart vs. Baltimore & Ohio R. R. Co., supra, at page 309:

"The time fixed by law within which the defendant," (the B. & O. Co.), "should complete its road to the Ohio river in this state had expired long prior to the passage of said act of 1847. It is also a part of the public history of this state that after the passage of the act of 1847, the defendant constructed principally all its road within the state, west of Cumberland, and to the city of Wheeling, within the time prescribed by the act of 1847, and that it was done under and by authority of the acts of 1827 and 1847 aforesaid."

Further on in the same opinion it is said:

"The Legislature of this state, by joint resolution duly passed on the 28th day of February, 1871, and published by authority of law with the public acts, recognized the decisions of the courts of Virginia and of this state, above cited as to the acceptance of the act of 1847, and in effect declared that the defendant did accept said act, and required the attorney general, unless the defendant communicated to him its unreserved recognition of the fact that the said act of the legislature of Virginia passed the 6th day of March, 1847, is binding upon it, and that it (defendant,) is subject thereto, &c., to institute legal proceedings against defendant by quo warranto

or other proceedings most effective to enforce compliance on the part of defendant with the several provisions of its charter; and further directed the attorney general that should the defendant make such communication as mentioned, to deliver the same to the secretary of state, by whom it should be filed in his office. The defendant, afterwards, by a writing dated the 20th of June, 1871, signed by its president and attested by its seal, communicated to the attorney general its unreserved recognition of the fact that the said act passed the 6th of March, 1847, is binding upon it, and that it is subject to its provisions. This communication, in pursuance of said resolution and by virtue thereof, was duly filed with the secretary of state, and must be regarded as part of the public history of the state in connection with defendant and its liability to taxation, and this court can take judicial notice thereof. Under the circumstances we feel fully authorized and bound to hold that we must ex-officio take notice of and know that the defendant is not only an incorporated railroad company within this state, but that it was, when the chap. 61 of the code of West Virginia took effect, governed by the said act passed by the legislature of Virginia on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, so far as the same can apply."

Whether there was an acceptance filed, as required by the act of 1847, or not, the company having gone on and constructed its road as permitted by such act, it is now estopped to deny such acceptance.

That the General Assembly of Virginia supposed that the Baltimore and Ohio Railroad Company was a corporation of Virginia is shown by the fifth section of an act, passed March 21, 1850, (see session acts of 1849–50, page 49), entitled "An act concerning the city of Wheeling and the Baltimore and Ohio railroad company," which section reads as follows:

"5. That in case proceedings be instituted against said company under the authority of the preceding section, it shall be deemed a privileged case, and shall be determined as speedily as may be consistent with a full understanding and fair trial thereof; and no judgment therein, whether on information in the nature of a quo warranto or otherwise, shall have the effect to operate a forfeiture of the said company's charter, or be enforced for that purpose, or deprive the said company of any of their rights, privilege and franchises as granted by their said charter; but if the decision in any such proceeding or the decision of said board of engineers be adverse to the said company, then it shall be lawful for any court or judge having jurisdiction of the subject, at the instance of the attorney-general, proceeding in the name of the state, to enjoin and restrain the said company from constructing their said railroad on any route not conformable to such decision. And it shall be the duty of the attorney-general to apply for said injunction if thereto requested by said city of Wheeling."

The General Assembly in 1850 supposed that legal proceedings authorized by it would operate as a forfeiture of the company's charter, unless it expressly provided otherwise. The charter meant is evidently a Virginia charter, for the General Assembly of Virginia could not authorize a suit which *should be a privileged case* and which could have the effect of forfeiting a Maryland charter.

The legislature of West Virginia has also, since the creation of that State, declared that this company is a domestic corporation. The 16th section of chapter 227 of the acts of the legislature of West Virginia of 1872–73 is as follows:

"16. All railroad companies doing business in this state under charters granted *or laws passed* by the state of Virginia or this state, are hereby declared to be domestic companies or corporations, and shall be treated as such in all cases."

Again on page 277 of the acts of West Virginia of 1882, (chapter 97 on corporations, § 30,) we find the following:

"Every railroad corporation doing business in this state under the provisions of this section, or under charters granted *or laws passed by the state of Virginia*, or this state, is hereby declared to be as to its works, property, operations, transactions and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation."

In 1855 the court of appeals of Virginia, in the Baltimore and Ohio Railroad Co., vs. Gallahue's administrators, (12 Gratt, 655), decided that the company was a Virginia corporation. The opinion of the court was delivered by Allen, president, all the other judges concurring.

After stating the act of March 8th, 1827, he proceeds:

"The company under this law is a Virginia corporation, and its powers within the territory of Virginia are derived from the grant contained in the Virginia law. The act of Maryland incorporated the subscribers to the capital stock their successors and assigns, by their name designated; and the Virginia act in effect re-enacts the Maryland law in all essential particulars; thereby erecting the company into a Virginia corporation within her territory. If liable to be sued in Maryland, the same liability attaches to it in Virginia.

"It is judicially known to the court that the road traverses the territory of Virginia to a greater extent than it does through the state of Maryland. Throughout the whole course vast expenditures would be necessary in the construction, preservation and working of the road, innumerable contracts would be entered into, controversies would necessarily arise out of the contracts, acts and omissions of the company and its agents; and it would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory; and should be turned over to the courts and laws of a sister state to seek for redress. Such a construction would give the company almost entire immunity for its contracts and acts over most of the road, and would exempt its property in the territory of Virginia from all liability to its creditors: For process of execution from the courts of Maryland could not avail in Virginia.

"The subsequent legislation of the state shows that the legislature has uniformly treated it as a Virginia corporation, exercising the same controlling power over it as over other corporations deriving their existence from the laws of Virginia. By the act of March 1847, Sess. Acts, p. 86, the company was authorized to complete the road through the territory of Virginia over a route thereby prescribed; and by the 6th section of this law it was subjected to the provisions of the general railroad law of the 11th March, 1837, with respect to that portion of the road constructed within this commonwealth, so far as the same were properly applicable; and the company was required to accept the provisions of this act within six months, as a condition upon which the powers and privileges of the said act were granted.

"Under this act, as it appears from the preamble of the act of 21st of March, 1850, Sess. Acts, p. 49, the company has proceeded to complete its road: Thus, with respect to that portion of the road constructed in Virginia, submitting itself to the provisions of the general law regulating railroad companies incorporated by this commonwealth."

The Supreme Court of Appeals of West Virginia has repeatedly decided the company to be a domestic corporation of West Virginia, approving and following the case of the Company vs. Gallahue's adm'rs, supra.

The case of Goshorn vs. Supervisors, 1 W. Va., 308, follows the decision in the Gallahue case and the case of the B. & O. R. R. Co. vs. Supervisors, 3 W. Va. 319, refers to it as settled law. The last named case was decided at the January term, 1869, nearly two years before the case of the Railroad Companp vs. Harris, supra, which was decided in December, 1870. After the decision of the Railroad Company vs. Harris, the

Supreme Court of Appeals of West Virginia at the June term, 1873, in Hart vs. B. & O. R. R. Co., approved the decision in the Gallahue case that the company was made a Virginia corporation; and subsequently cited with approbation both the Gallahue and Hart cases in 1879 in the case of Mahany vs. Kephart, 15 W. Va., 623 and 624.

In the elaborate opinion, announced for the Court by Johnson, judge, in the B. & O. R. R. Co. vs. P. W. & Ky. R. R. Co. (17 W. Va. 812), the case of the Company vs. Harris is noticed and commented on, the court holding as follows:

"The Baltimore & Ohio R. R. Company is a domestic corporation in the state of West Virginia, and as such liable to be sued here. When sued in the courts of this state by a citizen thereof, such suit can not be removed into the circuit court of the United States, as that court has no jurisdiction in such a case."

This last case is the leading case in West Virginia on the subject of the citizenship of the Baltimore and Ohio Railroad Company, and the court is respectfully referred to the opinion in that case, as very fully and ably stating the views of the court of last resort in West Virginia, upon this citizenship question, as late as the spring of 1881.

At the same term the B. & O. R. R. Co. vs. P., W. & Ky. R. R. Co. was decided, i. e. the spring special term, 1881, the Supreme Court of Appeals of West Virginia decided the case of Henen's admr. vs. B. & O. R. R. Co., (17 W. Va. 881,) which is a case in which a writ of error had been granted to an order permitting the removal into the Federal Circuit Court of a case brought by a citizen of West Virginia against the B. & O. R. R. Co. In the Henen case it was held:

"A railroad corporation may have an existence in more than one state, if chartered or licensed to build its road in more than one state.

The Baltimore and Ohio Railroad Company is a domestic corporation of this state and liable to be sued here; and the court will take judicial cognizance of that fact. Hart vs. The Baltimore and Ohio Railroad Company, 6 W. Va. 336.

"When such company is sued in the courts of this state by a citizen thereof, such suit cannot be removed into the circuit court of the United States for the district of West Virginia, as in such case said 639th section of said Revised Statutes does not apply to or embrace the said company."

At the October term, 1882, of the same court, in the case of Quarrier vs. B. & O. R. R. Co. (20 W. Va. 424,) the principles laid down in the B. & O. R. R. Co. vs. P., W. & Ky. R. R. Co., and Henen's adm'r, vs. B. & O. R. R. Co., in relation to the removal of cases by the B. & O. R. R. Co. to the circuit court of the United States were again declared. The Quarrier vs. Railroad Co. case was decided a year after the case of the Railroad Co. vs. Koontz, 104 U. S., 5.

That the courts will take judicial notice of the acts incorporating the Baltimore & Ohio Railroad Company and that it is a corporation, was also decided in the State vs. B. & O. R. R. Co., 15 W. Va. 362.

If the B. & O. R. R. Co. was a corporation of Virginia it is now a corporation of West Virginia.

As is said in Mahany vs. Kephart, (supra): "At the time of the last named decision," i. e. the decision in the case of the B. & O. R. R. Co. vs. Gallahue, "the Baltimore & Ohio Railroad west of the Potomac river at Harper's Ferry was mostly in the state of Virginia, but the same fell into West Virginia on its becoming a State of the Union." See also the Railroad Co. vs. Koontz, (supra).

The "Maryland granted powers" of the Baltimore & Ohio Railroad Company, as already said, were, among other things, to be a corporation by a particular name—by that name to be capable in law of purchasing, holding and selling real and personal estate; to have perpetual succession by its corporate name; to sue and be sued; to have and use a common seal, and to have, enjoy and exercise for the purpose mentioned in its charter, all the powers, rights and privileges of other corporate bodies. All these and other Maryland granted powers it might exercise in Virginia, and to hold that it is not a Virginia corporation, would be to hold that it is a corporation, in fact, exercising all the rights and privileges and subject to the obligations and having all the essential attributes of a corporation, yet that it is not a corporation.

The reliance of the Railroad Company upon this question

has always seemed to be the case of B. & O. R. R. Co. vs. Harris, 12 Wall, 65, particularly the second clause of the syllabus, which reads as follows:

"First. That no new corporations were created, either in the District or in Virginia, but only that the old one," (that is the Maryland corporation) "was exercising its faculties in them with their permission; and that as related to responsibility for damages, there was a unity of ownership throughout."

Upon a perusal of this case, if the view be taken that the court seems to have taken, that the Virginia act of March 8th, 1827, was only an enabling act, still the case was not fully presented, in this, that that part of the road at least, that was built under the act of 1847, was not considered, nor was the act itself considered, but on the contrary expressly laid out of the case as not affecting the question under consideration there, (p. 79), which as we shall see was a totally different question from the one here for decision. By that act the B. & O. R. R. Co. placed itself under the general railroad law of 1837, and built a part of the line of its road. The court on page 82 of this very same case says:

"Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction."

That this may be done was distinctly held in the Ohio and Mississippi Railroad Co., vs. Wheeler 1 Black, 286. Here then is a corporation, to take the worst view, of another state, permitted to be placed upon the same basis as a home corporation, and treated as such, allowed to build a line of road in this state and made in every way a home corporation by this act of 1847, *quo ad* the road to be built under that act; yet in the face of these acts, not considered in the Harris case, this court is called upon to say that the B. & O. R. R. Co., is not a corporation of the State of West Virginia, in respect to the very part of the road which was built in that State under the act of 1847 and in respect to portions built since that act. Without setting out the facts of the Harris case, it may be safely said that it was not necessary in that case to determine whether the B. & O. R. R. Co. was a corporation of the State

of Virginia, or only the corporation of another State, exercising certain rights and privileges, and that the court so views the question, when it says on page 84:

"But turning our attention from this view of the subject and looking at the statute alone "(that is the statute of the District of Columbia)" and reading it by its own light we entertain no doubt that it made the company liable to suit where this suit was brought, in all respects as if it had been an independent corporation of the same locality."

In the case of the R. R. Co. vs. Harris, the question before the court was not the effect of the Maryland and Virginia statutes with respect to the jurisdiction of the Federal Courts, but was the effect of those statutes as to the unity and identity of the corporation. The original Virginia statute was discussed "as regards the point under consideration," which was whether that act created a new corporation, as was contended by the railroad company. The jurisdictional effect of such a statute as regards the Federal Courts, is considered upon p. 82, where it is said:

"We see no reason why several states cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. * * * The jurisdictional effect of the existence of a corporation, as regards the Federal Courts, is the same as that of a copartnership of individual citizens, residing in different states."

A federal court could not have jurisdiction of a suit between such a corporation and a citizen of one of the states creating it.

It will plainly appear that the question decided was not a jurisdictional one, from what is said on p. 86:

"The jurisdiction of the court was not governed by the 11th section of the Judiciary Act of 1789. It did not depend upon the citizenship of the parties."

The case of the Railroad Co. vs. Koontz, (104 U. S., 5), has been in other cases alleged by counsel for the company to be an authority sustaining the claim that the company is a Maryland corporation only. The question whether the act of the General Assembly of Virginia of 1827 made the company a Virginia corporation or merely licensed it to do business in the territory of Virginia was expressly held to be

unimportant in that case and was not decided therein. The opinion says, speaking of this question:

"That question is, however, unimportant here, as it is conceded that the part of the road originally in Virginia is now in West Virginia, and that the company no longer uses in Virginia any of the franchises conferred by the Enabling Act of that state. Neither the Court of Appeals nor counsel here make any claim on account of that legislation. Even conceding that the company was once a Virginia corporation, so far as its original road in that state was concerned, the most that can be said of it now is, that, in common with all citizens of the old state residing on the ceded territory, its citizenship was transferred by the organization of West Virginia from the old state to the new. Consequently, if it was once a corporation of Maryland and Virginia it is now a corporation of Maryland and West Virginia. Any citizenship it may have had in Virginia has been lost.

It is not contended that this Enabling Act gave the company a right to lease another Virginia road and operate it as a lateral road, nor that in running the leased road the company uses any of the franchises conferred by the original grant. The present claim is that, by using the franchises of another Virginia corporation to run its leased road, it made itself a corporation of Virginia for all the purposes of that business, just as the lessor was and is."

Nothing contained in the case of the Railroad Co. vs. Koontz, can be regarded as deciding or tending to decide the question under consideration.

If the Baltimore & Ohio Railroad Company is a citizen of both Maryland and West Virginia, it is proceeding in this case as a citizen of West Virginia in respect to its West Virginia property. It can not allege its citizenship in Maryland as a reason for the removal of the case to the United States Court. Memphis & Charleston Railroad Company vs. Alabama, 107 U. S. 581; Ohio & Mississippi Railroad Co. vs. Wheeler, 1 Black, 286; Railway Co. vs. Whitton, 13 Wall. 270, 283; B. & O. R. R. Co. vs. P., W. & Ky. R. R. Co., 17 W. Va., 812; Maryland vs. Northern Central Railway Co., 18 Md. 193; County of Allegheny vs. C. & P. R. R. Co., 51 Pa. St. 228.

The rights this company claim they are asserting in this proceeding are West Virginia rights, in respect to the assessment of its West Virginia property. The assessment is against it as a West Virginia corporation on its property in West Virginia. It is insisted that as a Maryland corporation the

Baltimore and Ohio Railroad Company cannot operate its railroad in West Virginia; but that it does so because it is entitled to do so being a West Virginia corporation.

THIS CASE IS NOT A SUIT AT LAW OR IN EQUITY.

(1) The Constitution of West Virginia by its terms prohibits legislation authorizing any court of this State to take jurisdiction in this matter in any way; (2) it prohibits the legislative branch of the state government from conferring such jurisdiction upon the circuit courts as is attempted to be conferred by section 67 of chapter 29 of the Code; and, (3) if such jurisdiction can be conferred on the circuit courts, it is not a jurisdiction or power to be exercised by them as courts, but as appellate tax tribunals, and their conclusions are not judgments in such proceedings, but assessments only. It follows therefore that in no event can any state court entertain jurisdiction. If prohibited by the Constitution, of course there is no jurisdiction; if the proceedings in the circuit court could not not be authorized by the Legislature under the State Constitution, the proceedings did not constitute a removable case; and, if the circuit court merely acted as an appellate tax tribunal, there is no warrant in law for the Federal Court entertaining the proceeding.

Constitutions, like legislative enactments, are to be read as a whole and such construction and interpretation is to be given thereto as to make effective all parts thereof.

And we learn from the first section of the eighth article where the judicial power of the state is vested, by the following unmistakable terms:

"The judicial power of the state shall be vested in a Supreme Court of Appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace."

The inferior tribunals in which judicial power is vested are then those authorized in the Constitution, *i. e.* county courts, clerk of the county court of Ohio county, the municipal court

of Wheeling and the judge thereof, other courts of limited jurisdiction in any incorporated city, town, or village, and the alternative tribunal in lieu of a county court named in the 29th section of the eighth article. The Board of Public Works not being a tribunal named in the Constitution, and being purely a legislative creation, is not one of those inferior tribunals authorized by the Constitution in which any of the judicial power of the state is vested.

If the State Supreme Court has jurisdiction it must be because the Legislature has given it under its constitutional power to confer upon the Supreme Court of Appeals "such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law."

But such other appellate jurisdiction is only to be conferred in a civil or criminal *case*. There must be a case, a law case, a case in a court between parties, plaintiff and defendant, and the appellate jurisdiction which can be conferred by the Legislature upon such court is judicial jurisdiction, a jurisdiction to exercise its judicial powers in a class of cases not covered by the specific enumeration of the cases in which it can exercise appellate jurisdiction contained in the third section of the eighth article, which reads as follows:

"It shall have original jurisdiction in cases of *habeas corpus*, *mandamus*, and prohibition. It shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy toll, or taxes; and, also, in cases of *quo warranto*, *habeas corpus*, *mandamus*, *certiorari*, and prohibition, and in cases involving freedom or the constitutionality of a law. It shall have appellate jurisdiction in criminal cases where there has been a conviction for felony or misdemeanor in a circuit court, and where a conviction has been had in any inferior court and been affirmed in a circuit court, and in cases relating to the public revenue, the right of appeal shall belong to the state as well as the defendant, and such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by laws Constitution of West Virginia, Art. VIII, sec. 3.

In the case of *Rees* v. *Watertown*, 19 Wall. 116, the court says:

"We are of opinion that this court has not the power to direct a tax to

be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary."

In delivering the opinion of the court in *Heine* v. *The Levee Commissioners*, 19 Wall. 660 and 661, Mr. Justice Miller says:

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. * * * * The power must be derived from the Legislature of the State. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest the power in some other tribunal. * * * * It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the state government."

And the same doctrine is again laid down and approved in the late case of *Thompson* v. *Allen County*, 115 U. S. 55*et seq.*

In West Virginia, in the case of *Wells* v. *Board of Education*, 20 W. Va. 164, 165, Judge Green, announcing the opinion of the court, says:

"This power of ascertaining, what rate of taxation is necessary to raise a fund, which with the state quota shall be sufficient to keep open the free schools of the district, is in its nature legislative and not judicial; and it is conferred on the boards of education of the school districts. It being legislative in its character, the circuit court could not properly exercise it; *and indeed the Legislature under our Constitution could confer no such power on the circuit court.* But in truth the Legislature has not attempted so to do. * * * * But there is in this act no authority attempted to be given to the circuit court to make the proper levy; but it is left to the board of education of the school district in like manner, as it was left to the county court to make the proper levy, after a levy made contrary to law had been annulled by the circuit court."

The assessment of property is as much an incident of the power to tax as the levy of the tax. An assessment of the value of property is a necessary step in taxation, as necessary as the fixing of the rate. Without the assessment no levy could be laid. It is absolutely required that a valuation should be made, or else no uniform taxation could result. The very

first step in taxation is the assessment of values. It is the foundation. It is part of the taxing power and as much a legislative power, as the levy, apportionment or collection of the revenue. If under the West Virginia constitution the legislature can not confer the power to fix the levy upon the circuit court, it can no more give such court the power to make an assessment, which is but one of the steps towards fixing the levy. No levy can be made until an assessment has been first completed, for the amount of the levy or its rate is determined by the necessities of the government and the assessed value of the property upon which the levy is made. The *whole* subject of taxation belongs to the legislative department, not some parts or steps therein. The assessment, the levy, the collection are collectively taxation, and are all embraced when it is said that taxation is a legislative and not a judicial function. But it may be said that the duties of assessors, or boards of assessments or equalization are judicial in their character, because they require the exercise of judgment. So do the performance of his duties by any legislator, if he properly attends to them, and so do the duties of every executive officer require the exercise of judgment and discretion. Members of boards of education in removing teachers, members of councils of cities deciding upon the removal of officers of the municipality, or the election of the members of their own body, and in many other cases which might be cited, all exercise discretionary authority, or one which, by law, was confided to their deliberate judgment. Nor is any officer, who exercises such discretionary powers, involving the exercise of deliberate judgment, whether an assessor or other officer, liable to a suit at law to hold him personally responsible for an error in judgment, even though not a judicial officer and not exercising judicial functions. *Henderson* vs. *Smith*, 26 W. Va. 829.

It is said in Hagar vs. Reclamation District No. 108, (111 U. S. 710,) that officers in estimating values for taxing purposes act judicially and numerous cases are cited, but even though this view be taken still it does not follow that they are there-

fore a court and their proceedings suits at law or in equity.

In *Dillingham* vs. *Snow*, 5 Mass. 558, Parsons, C. J., says:

"Now, when judicial officers, deriving their authority from the law, mistake or err in the execution of their authority, in a case clearly within their jurisdiction, which they have not exceeded, we know of no law declaring them to be trespassers *vi et armis*. If the law were otherwise respecting assessors, who, when chosen, are compellable to serve or pay a fine, hard indeed would be their case. But the same law must apply to them, as to inferior judicial officers."

The judge does not say, "the same law must apply to assessors, as to *other* inferior judicial officers." He does not then class assessors at all as judicial officers.

I conclude that the fact, that in common with many other officers, who are not judicial officers, assessors enjoy the protection of the judicial privilege, does not make them judicial officers in the sense of being vested with any of the judicial power of the State. "Indeed, any officer, sworn to act faithfully, according to the best of his ability, and according as things shall appear to him, is a judicial officer within the rule." Sher. & Red. on Neg. sec. 163.

It may be urged, that in Virginia for more than half a century at least, and in West Virginia since its formation, the courts have set aside and annulled tax levies by virtue of statutory powers and in statutory proceedings. This is true, but the courts acted as courts and judicial tribunals. The superseding of an illegal levy is a judicial act, just as the court in any proper case declaring an act of the legislature unconstitutional performs a judicial act. Such acts are very different from an attempt by the court to make a new levy in lieu of the one annulled or superseded, or a new law in place of one declared invalid as being in conflict with the constitution.

Neither the State Supreme Court, nor the circuit courts of the State, as courts, can be made assessors of taxes by legislative enactment.

In California in 1854, there being no board of supervisors in Nevada county, the county taxes were assessed by the court of sessions. Judge Stephen J. Field indelivering the

opinion of the court in a case arising by reason of such assessment, on a levy and sale for taxes, says:

"The court of sessions, under the constitution, can only exercise powers of a judicial character. The legislature is incompetent to confer upon the court any other powers. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character. It is a legislative act; it requires the exercise of legislative power, which, for certain governmental purposes in the county, may be devolved upon a board of supervisors, but can not be delegated to any branch of the judicial department." *Hardenburgh* v. *Kidd*, 10 Cal. 403.

In the case of the *K. P. Railway Company* v. *Commissioners of Ellis County, et al.*, 19 Kansas 587,—a case in which a board of commissioners had increased an assessment, the court says:

"The proceedings before the county commissioners were not judicial, but in assessment. Section 65 of the tax law under which these proceedings were had, provides simply for the correction of an assessment, It prescribes notice to the taxpayer as a condition of valid action; but such notice does not turn the proceeding from one in the nature of an assessment, into a judicial inquiry. Indeed, unless the legislature had prescribed notice, it is doubtful whether any were essential. Correcting an assessment is no more of a judicial act than making he assessment originally. True, it involves a determination; but so does almost every political or executive act. But it is not a judicial determination. The most that can be said is that it is *quasi judicial*."

I think it has been conclusively shown that taxation is a legislative power or function, and that the assessment of values for the purpose of taxation is also of the same nature, and not a judicial power that under the West Virginia constitution can be conferred upon a judicial tribunal as such. The "other appellate jurisdiction, in both civil and criminal cases," which may be conferred by law on the State Supreme court, is jurisdiction of cases decided in inferior courts, or judicial tribunals, in the exercise of judicial powers or functions, and not of matters determined by tribunals or boards not exercising such powers. It follows then that if the State circuit court had no right to entertain any jurisdiction of this matter, or in entertaining jurisdiction merely acted in the capacity of a board or tribunal of review and correction of the assessment, and not judicially, the State Supreme Court would have no jurisdiction to grant a writ of error or appeal from its action.

The jurisdiction of the circuit courts of West Virginia is the subject considered in the 12th section of the 8th article of the Constituion, which reads as follows:

"The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals, by *mandamus*, prohibition and *certiorari*. They shall, except in cases confined exclusively by this constitution to some other tribunal, have original and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars; of all cases of *habeas corpus*, *mandamus*, *quo warranto* and prohibition; and of all cases in equity, and of all crimes and misdemeanors. They shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or *supersedeas* may be allowed to the judgment or proceedings of an inferior tribunal. They shall also have such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be prescribed by law."

It is perfectly apparent that under the 67th section of chapter 29 of the code of West Virginia the board and the circuit court deal solely with the subject of valuation or assessment, and the section attempts to constitute assessment tribunals of the judicial tribunals, the circuit courts. No provision is made for costs of the proceedings as in law cases and the court has no means provided for enforcing its judgement. Like any other assessor or assessment board, the circuit court merely certifies the result of its assessment to the auditor for his subsequent action.

The matter is brought from the Board of Public Works to the circuit court by appeal, and this is not a proceeding by *mandamus*, prohibition or *certiorari*. No amount is in controversy, exclusive of interest, exceeding fifty dollars. This is not a case of *habeas corpus, mandamus, quo warranto* or prohibition, a suit in equity, or a case of crime or misdemeanor. The inferior tribunals, to the judgments and proceedings of which an appeal, writ of error or *supersedeas* may be allowed by the circuit courts, are inferior *judicial* tribunals, and the other supervisory and appellate jurisdiction, which may be prescribed by law for the circuit courts, is a supervisory and appellate jurisdiction over judicial tribunals, or, in other words, over courts of justice. The other original and con-

current jurisdiction which can be conferred by law upon circuit courts is to be confined to a jurisdiction in matters judicial.

The constitution of Illinois provides that property is to be valued for taxation by persons appointed or elected in such manner as the legislature shall direct, and the court of last resort in that state has decided, that neither the courts, nor any other department of the government, have power to review or change an assessment of property by the proper officers. *Republic Life Ins. Co.* vs. *Pollak et al*, 75 Ill. 292.

The Supreme Court of Ohio, when as good a jurist as Rufus P. Ranney took part in the decision of the case, in *Logan Branch Bank, ex parte*, (1 Ohio St. 433) had before it a proceeding which involved the question of the right to appeal to the Supreme Court from the decision of the auditor of state under a statute "for the assessment and taxation of all property in the state, and for levying taxes thereon, according to its true value in money."

The statute provided that the auditor of state, with the advice of the attorney general, "should decide all questions which may arise as to the true construction of this act, or in relation to any tax levied or proceeding under the same, subject, however in all cases, to an appeal to the Supreme Court." In the opinion the court says:

"With reference to the statute itself, it may be remarked, that it does not purport to cloth the auditor of state with judicial powers and functions; it imposes no new or additional duty upon him; for in the exercise of the duties of his office as auditor of state, the decision of all questions arising under the law affecting his official obligations would necessarily devolve upon himself in the first place; and it is by his own decisions, guided by the best lights around him, that his official action must always be regulated; subject, of course, to such rules as may have received judicial sanction. But this law authorizes him to go no further. He can render no judgment against any party, and is powerless to enforce any judgment. He has not, in fact, undertaken to pronounce any judgment, and the appellate jurisdiction of this court only extends to the judgments or decrees of an inferior court. * * * * Inasmuch, therefore, as the auditor of state can in no sense be considered as having exercised any judicial function in the premises, and as we have no idea of an appeal, except from one court to another, this proceeding must be dismissed for want of jurisdiction."

I respectfully contend that this decision of the Supreme Court of Ohio is precisely in point in this matter. The Board of Public Works in no sense sat as a court in making the assessment complained of. Its proceedings were not of a judicial character. They merely ascertained and fixed the value of the railroad property and *apportioned* same, and ordered the valuation and apportionment to be certified to the auditor for his action under the law. It follows that no appeal could be allowed by law from the board's action.

A most pertinent, carefully considered case, illustrative of the law governing this proceeding, in which a powerful and exhaustive opinion was rendered by the court, through Kingman, C. J., was decided in Kansas in 1870. I allude to the case of *The Auditor of State v. The Atchison, Topeka & Santa Fe Railroad Co.*, 6 Kansas 500.

A statute of Kansas attempted to authorize an appeal from the appraisal and assessment of railroad property by the board of appraisers and assessors to the supreme court of the state. In that case the court held as follows:

"The jurisdiction of the supreme court is restricted by the constitution to original proceedings in quo warranto, *mandamus* and habeas corpus, and such appellate jurisdiction as may be provided by law.

"The appellate jurisdiction can only be given where there has been a decision by one clothed with judicial authority, and acting in a judicial capacity when making the decision.

"The power to tax is a legislative power, and not in any sense judicial. The valuation of property for purposes of taxation is an incident to the taxing power, and therefore not such judicial power as can be conferred upon the supreme court.

"Section 11 of chapter 124 of the laws of 1869, giving the supreme court jurisdiction to hear appeals from the board of county clerks, in the appraisal of the property of railroads for purposes of taxation, is giving said court power, not judicial in its character, and is, therefore, not authorized by the constitution."

It appears from the case last cited and *Hayburn's Case*, 2 Dallas, 412, that no decision of a court is liable to a revision or even suspension by the legislature, but nevertheless, the assessment and valuation of railroad property, in any year,

made on appeal by a circuit court can be annulled by legislative act.

I conclude from the foregoing reasons and authorities, that the legislature could not give jurisdiction in the matter of assessment of railroad property to any state court, under the constitution.

It is claimed by some that in considering appeals under said 67th section, the state circuit courts do not act as judicial bodies, but as tribunals for correcting assessment, non-judicial in character. This view of the statute law in question is not entirely novel in its character.

The Legislature of Michigan, in 1872, passed a statute authorizing an appeal from the assessment of taxes made by the auditor general to the circuit court. A case arose involving the construction of this statute, and I cannot refrain from expressing my regret at the shortness of the opinion therein, inasmuch as it was pronounced by that eminent jurist, Thomas M. Cooley, then the Chief Justice of Michigan. Short as this opinion is, and meagerly as the case is reported, I think that sufficient is shown in the report to answer our purposes and render intelligible the grounds of the court's decision. Judge Cooley says:

"The writ of error in this case must be dismissed The proceedings had in the court below were on appeal from an assessment of taxes made by the auditor general. The appeal to that court was taken under act No. 57 of 1872 (S. L. vol. 1 p. 89), and the proceedings under that act were evidently not intended to be judicial in the proper sense of that term. The statute was evidently designed to make the circuit court an appellate tax tribunal, and nothing more. Its conclusion would not be a judgment, but only an assessment. There are difficulties in giving effect to such a statute, but we do not think it expedient to consider them in this proceeding, of which we clearly have no jurisdiction."

Auditor Gen. vs. Pullman Palace Car Co., 34 Mich. 52.

I contend that, even if it can be held that the State circuit courts could be enabled to make or correct an assessment by legislative act conferring upon them the jurisdicton to do so, so, nevertheless, their proceedings would not be judicial in the proper sense of that term.

But we are considering a local statute of West Virginia in a proceeding in which no federal question arises, except the right of removal. The United States Courts will follow the decision of the state tribunals as to the construction and validity of the statute, no principle of commercial or general law being impaired. Norton vs. Shelby County, (decided by this court May 10, 1886,) and Hagar vs. Reclamation District No. 108, 111 U. S. 704.

The Supreme Court of Appeals of West Virginia, since the order was entered remanding this case, (on July 7, 1886,) decided a case entirely like the one under consideration in principle. The Pittsburgh, Cincinnati and St. Louis Railway Company appealed from an assessment of the value of the portion of its bridge over the Ohio river at Steubenville, Ohio, within the state of West Virginia, made by the Board of Public Works for the year 1885, to the circuit court of Brooke county, West Virginia. On March 19, 1886, the circuit court of Brooke county entered an order fixing the valuation, to which the railway company excepted and upon its motion the court signed a bill of exceptions making all the evidence heard a part of the record. Upon the petition of the railway company, a writ of error and supersedeas to the order was allowed by one of the judges of the Supreme Court of Appeals of West Virginia.

This case will appear in the 28th volume of West Virginia reports (now in press) at page 264, entitled "P., C. & St. L. R.'y Co, vs. Board of Public Works et al."

Owing to the probability that the court will not have access to the 28th W. Va. report, when considering this case, I take the liberty of printing herein the syllabus of the case and the major part of the opinion. The syllabus prepared by the court is as follows:

"1. The action of the circuit court in supervising the decision of the board of public works as to the assessment and valuation of railroad property for taxation under the provisions of chap. 52, Acts 1883, is merely administrative and not judicial—the court acting in such case as an appellate assessment or tax tribunal and exercising powers distinct from those belonging to it as a court or judicial tribunal in the legal sense of that term. (p. 267).

"2. Under our Constitution the Supreme Court of Appeals of the State has no power to review by writ of error or appeal the decisions or orders of inferior tribunals, officers or boards as to matters, which are simply administrative, executive or legislative and not strictly judicial in their nature, except where such power may be expressly conferred by the Constitution. (p. 270).

"3. This Court has no jurisdiction to review by writ of error a decision of the circuit court correcting an order of the board of public works assessing and fixing the value of railroad property for taxation. (p. 271).

"4. The second point of the syllabus in *Low* vs. *County Court*, 27 W. Va., 785, is overruled. (p. 272)."

Snyder, Judge, delivering the opinion for the court, says:

"It is insisted by the attorney-general for the State, that a writ of error does not lie to this Court from any judgment or order of the circuit court in a proceeding of this nature, even if the circuit court had jurisdiction to make the order which he likewise questions. The first question then to be determined is the one of jurisdiction thus presented.

"The circuit court having taken jurisdiction, and the railway company, the plaintiff in error, having brought the case to this Court to review the action of that court, it is not in a position to question that jurisdiction. And the defendant in error, being before this Court, insisting that it has no jurisdiction in this case, it is likewise precluded from questioning the jurisdiction of the circuit court or asking us to pass upon that question in this case; for, if we have no jurisdiction ourselves we have no power to pass upon that question or any other matter except the one relating to our jurisdiction. And the only order we can make in the case, if the claim of the defendant in error is sustained, is an order dismissing the writ of error. It is, therefore, unnecessary for this court to consider whether or not the circuit court had jurisdiction, except so far as such consideration may be involved in the determination of our own jurisdiction or want of jurisdiction.

"The writ of error according to the common law lies only to remove a cause from a court of record of competent jurisdiction to an Appellate Court. 3 Story Const. § 1721. It does not lie to review the proceedings of a court or tribunal not of record. The orders or proceedings of such tribunals are, when reviewable, generally reviewed by writ of *certiorari*. The writ of error must be not only from a court of record, but it must be from a judgment of such court rendered in a judicial proceeding. A judgment founded upon a judicial determination of a controversy in a suit or action *inter* parties. And it does not lie, even from a court of record, when the order or judgment of such court sought to be reviewed is simply an *ex parte* or administrative order or proceeding. Such order and such proceedings, when reviewable, are likewise the subjects of a writ of *certiorari*, and they are never reviewable by writ of error. That such are the limits and uses of the writ of error is elementary law and too well settled to admit of controversy or argument.

"It becomes important therefore to inquire whether or not the order or judgment of the circuit court, sought to be reviewed by writ of error in this case, was made in a judicial proceeding; and whether it is the determination and result of the action of that court acting in its judicial capacity, or simply an *ex parte* or administrative order made by the judge of said court in a legislative or executive capacity.

"The statute, under which the said proceeding was had, after declaring the manner in which the board of public works shall ascertain and fix the assessable value of the property of railroad corporations, provides that "the decision of said board shall be final, unless the same be appealed from within thirty days after such decision," &c. "Any corporation claiming to be aggrieved by any such decision may, within the time aforesaid, appeal therefrom as to the assessment and valuation, made within each county through which its road runs, to the circuit court of such county. * * * The court shall hear all such legal evidence on such appeal as may be offered by the State, county, district or municipal corporation, and by the corporation or company taking such appeal. And if the court be satisfied that the value so fixed is correct, it shall confirm the same; but if it be satisfied that the value so fixed by said board is either too high or too low, the court shall correct the valuation so made, and ascertain and fix the true value of such property according to the facts proved, and certify such value to the auditor." Ch. 52, Acts 1883, p. 76.

"It will not be claimed, that the board of public works acts as a judicial tribunal in ascertaining and fixing the valuation of the property of the company under the statutes. It simply acts as assessor in such cases, just as the county assessor does in assessing the property of individuals. The acts in both instances are merely ministerial, and they are judicial in no proper sense of the term.

"The statute provides that, upon appeal from the finding or decision of the board of public works, the circuit court may either confirm said decision or proceed to make a new and true assessment of the value of the property. No provision is made for summoning the parties before the court. Provision is made for hearing the evidence adduced by the parties; but the board of public works may also hear evidence, and it is required to base its judgment upon all the information and evidence it may be able to procure. The whole scope and purpose of the statute, it seems to me, is to make the court simply an assessor to review the action of the board of public works, and if dissatisfied with said action it may make a new assessment and fix the true value of the property. The action of the court is of the same character with the same elements of discretion and judgment as that possessed by the said board, and none other. Both act according to the evidence attainable and according to their best judgment and discretion. It is true the judgment of the court must succeed that of the board, and is in review of the latter, but that does not alter the nature of the act to be per-

formed. Both act as assessors, and their acts are plainly ministerial and not judicial.

"The fact, that a ministerial act is performed by a court, does not change the nature of the act and make it judicial. In *McClure* v. *Maitland*, 24 W. Va. 561, this Court decided that orders and decrees of the circuit court, entered in proceedings for the sale of forfeited lands for the benefit of the school fund, are merely ministerial or administrative acts and in no manner judicial, and that therefore no appeal would lie from such orders and decrees to this Court. And in a similar case this Court held that, where the statute made no provision for bringing parties before the court, the simple fact that the court did summons them as parties to the proceeding and bring them before it, did not make them parties or entitle them to appeal to this Court. (*Auril* v. *Iaeger*, 24 W. Va. 583).

"By the statutes of the State of Michigan the auditor general makes the assessment of the property of corporations, which under our statute is made by the board of public works; and by the fifth section of Act No. 57 of 1872 of the laws of Michigan, it is provided that, "In any case such corporation shall be dissatisfied with the estimate so made by the auditor general, it may appeal therefrom to the circuit court for the county, * * * within thirty days after receiving notice of such estimate." Then, after requiring the corporation to give bond for costs, &c., the act proceeds thus: "Upon filing with the clerk of said court said appeal, specifications and bond, such court shall proceed to the trial and determination of the same according to the rules of law, allowing a trial by jury, of all the questions of fact, in cases where such trial may be proper, and questions of law may be carried to the Supreme Court." This act also requires notice of such appeal to be served on the attorney-general of the State.

"Upon a writ of error under the provisions of this statute, Cooley, chief justice of the supreme court of Michigan, announced the following opinion which was concurred in by the other justices: "The writ of error in this case must be dismissed. The proceedings had in the court below were on appeal from an assessment of taxes made by the auditor general. The appeal to that court was taken under act No. 57 of 1872 (S. L. vol. 1, p. 89), and the proceedings under that act were evidently not intended to be judicial in the proper sense of that term. The statute was evidently designed to make the circuit court an appellate tax tribunal and nothing more. Its conclusion would not be a judgment, but only an assessment. There are difficulties in giving effect to such a statute, but we do not think it expedient to consider them in this proceeding, of which we clearly have no jurisdiction." *Auditor General* v. *Pullman Palace Car Co.*, 34 Mich. 59.

"This case is nearly identical with the one at bar, except that the Michigan statute required the attorney general to be notified of the appeal and in express terms authorized "questions of law to be carried to the Supreme Court," while our statute contains neither of these provisions.

"A statute of the State of Ohio provided that the auditor of State, with

the advice of the attorney general, "shall decide all questions which may arise as to the true construction of this act, or in relation to any tax levied, or proceeding under the same, subject, however, in all cases, to an appeal to the Supreme Court." 50 Ohio L. 166. Upon an appeal to the supreme court of Ohio under the provisions of said statute that court dismissed the appeal for the want of jurisdiction to hear it. In the opinion delivered in that case the court says: "With reference to the statute itself, it may be remarked, that it does not purport to clothe the auditor of State with judicial powers and functions; it imposes no new or additional duty upon him; for in the exercise of the duties of his office as auditor of State, the decision of all questions arising under the law affecting his official obligation would necessarily devolve upon himself in the first place; and it is by his own decisions, guided by the best lights around him, that his official action must always be regulated; subject, of course, to such rules as may have received judicial sanction. But this law authorizes him to go no further. He can render no judgment against any party, and is powerless to enforce any judgment. He has not, in fact, undertaken to pronounce any judgment, and the appellate jurisdiction of this court only extends to the judgments or decrees of an inferior court. * * * * Inasmuch, therefore, as the auditor of State can in no sense be considered as having exercised any judicial functions in the premises, and as we have no idea of an appeal, except from one court to another, this proceeding must be dismissed for want of jurisdiction."

"I have been unable to find any decision, in which the subject was considered by the court, in conflict with the foregoing authorities; but on the contrary many cases in support of the doctrine declared in them among which are the following: *Auditor* v. *The Atchison T. & S. F. Railroad Company*, 6 Kan. 500; *San Jose Gas Company* v. *January*, 57 Cal. 614; *Van De Grift* v. *Haynie*, 28 Ark. 270; *K. P. Railway* v. *Commissioners Ellis County*, 19 Kan. 584; *Hardenburg* v. *Kidd, &c.*, 10 Cal. 402; *Turner* vs. *Althaus*, 6 Neb. 54; *Republic Life Insurance Company*, v. *Pollak*, 75 Ill. 292; Cooley on Const. Lim., 34, 36.

"These authorities establish beyond the propriety of controversy, that the action and decision of a designated officer or board, whether the same be a court or other body, in reviewing and correcting an assessment of corporate or other property for taxation, are no more judicial acts than the acts of the officer or authority making the original assessment. They also show that the decision or finding of such officer or board, even if the same be a court or other judicial tribunal, is not such a judicial act or judgment as can be reviewed by a supreme or appellate court possessing judicial powers only although the statute may in express terms authorize such appellate court to review such finding or judgment.

"It is a plain proposition that the Constitution of this State confines the jurisdiction of this Court exclusively to judicial matters. It possesses both original and appellate jurisdiction, but by the very terms of the constitution

all of its powers, whether of the one class or the other, are wholly and exclusively judicial, and the legislature has no authority to confer upon it jurisdiction of any other or different character. Any other construction of the Constitution would enable the legislature to confer executive or legislative powers upon this Court and thus unite the executive or legislative and the judiciary departments of the State government in the same person, which is positively forbidden by the fifth article of our Constitution. But the legislature has not attempted to confer any such power upon this Court in reference to the subject now under consideration. It has not authorized any appeal or writ of error to this Court from the action and decision of the circuit court in proceedings of this nature. And, as we have seen, the jurisdiction of the circuit court, if it exists at all, is simply administrative and not judicial; that court acting merely as an appellate assessment or tax tribunal and exercising a power entirely different and distinct from that which legitimately belongs to it as a court or judicial tribunal in the legal and proper sense of the term; it conclusively follows therefore that this Court has no jurisdiction by writ of error or otherwise to review the order or judgment of the circuit court entered in this proceeding.

"The same conclusion was reached by this Court in cases of assessments of the property of individuals. In *Low* v. *County Court*, 27 W. Va. 785, we held that "No appeal lies from a judgment of a county court rendered under sec. 7, ch. 32, Acts of 1882, refusing to correct the assessed valuation on land." In that case, however, it was held that an appeal would lie under sec. 94 of ch. 161, Acts 1882, "from a judgment of a county court refusing to correct an assessment, *when it is claimed that the property assessed with taxes is not chargeable therewith.*" Reference to said sec. 94 will show that, while it, in terms, authorizes an appeal to the circuit court refusing to make the correction asked by the applicant, it makes no reference to appeals from the circuit court to this Court. In the opinion delivered in that case this language occurs: "This may justly be regarded as properly brought, under sec. 94, ch. 161, Acts 1882, and having been decided adversely to them by the county court of Lincoln county, an appeal lay therefrom to the circuit court of Lincoln and from that court to this, as the amount in controversy exceeds $100.00." (27 W. Va. 787–8.) It seems, therefore, that jurisdiction in that case was grounded upon the fact that "the amount in controversy exceeds $100.00." This, it seems to me, was an error. It does not appear from the report, that any stress was given to the consideration of the question of jurisdiction in that case. It seems to have been assumed that the proceeding was judicial and involved a controversy between parties—that is, that it was a civil action or suit in which more than $100.00 was in controversy. This, I think, was an unauthorized assumption which lead to an erroneous conclusion.

"The principles announced and the authorities cited in the preceding part of this opinion establish, it seems to me, beyond question, that the proceedings in that case were no more judicial than they were in the case at

bar, and that therefore this Court was without jurisdiction to hear that case by appeal or writ of error. As we are always more anxious to be right than to be consistent, and never willing to persist in error against our convictions, we frankly overrule the proposition contained in the second point of the syllabus in said case of *Low* v. *County Court*, 27 W. Va. 785. In thus acting we are not without precedent. *Dillard* v. *Tomlinson*, 1 Munf. 183, 199; *Davis* v. *Turner*, 4 Gratt. 422, 471; *Hill* v. *Peyton*, 22 Gratt. 550, 571; *Galton* v. *Hancock*, 2 Atk. R. 438. In *Bedinger* v. *Commonwealth*, 3 Call 461, 472, the Court of Appeals of Virginia disclaimed a jurisdiction, which it had exercised in many former instances, and thereby overruled its former decisions.

"For the reason hereinbefore stated, I am of the opinion, that this Court has no jurisdiction to review the action of the circuit court complained of by the plaintiff in error in this proceeding, and that therefore this writ of error must be dismissed as having been improvidently awarded."

If the West Virginia circuit courts have no jurisdiction as judicial tribunals of such proceedings as were instituted in this case by the railroad company under chap. 52, acts 1883, amending section 67 of the assessment law of that state, as has been decided by the state court of last resort, then clearly no removal can take place. If a state court does not have jurisdiction of the proceedings as a court, certainly a United States court does not. By the act of Congress removals are allowed in *suits* of a civil nature at law or in equity. The proceedings were not a suit, if the state circuit court was not acting as a judicial court in considering the matters involved and was only acting as an appellate tax tribunal. To be removable the suit must be a suit within the meaning of the state law. (In re Iowa and M. Const. Co. 6 Fed. Rep. 799.)

It is not here urged that, because the state law does not provide an appeal to the state supreme court from the circuit court in these railroad tax assessments, thereby making the state circuit court the court of last resort, the case is one which cannot be removed. Hess vs. Reynold (113 U. S. 75.) has settled such claim. Gaines vs. Fuentes, 92 U. S. 19.

Mr. Justice Miller in his dissenting opinion in the Railroad Co. vs. Mississippi, (102 U. S., 143,) gives a number of definitions of the word "suit." He says:

"Bouvier's Law Dictionary says that in the practice of the law 'suit'

means 'an action.' * * * Webster says 'suit' is the art of suing; the process by which one gains an end or object, and as a word in the law, he says it is 'an attempt to gain an end by legal process'; 'a legal application to a court for justice'; 'an action or process for the recovery of a right of action.' * * * Worcester defines it thus: 'In modern law, the prosecution of some claim or demand in a court of justice; judicial prosecution;' and perhaps this is as good a definition of the word, when used in reference to legal proceedings, as any that can be framed, and it is peculiarly applicable to the use of the word in the Act of 1875."

Every definition conveys the idea that the word "suit" as a legal term or word, means an action in a judicial tribunal, in a court of justice, sitting as such court, and not a proceeding before an appellate tax tribunal.

It is said in the opinion delivered by Mr. Justice Field in Gaines vs. Fuentes, supra, in reference to the removal act of March 2, 1867, as follows:

"It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states? and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

The case of the Boom Co. vs. Patterson, involved the right of removal of a proceeding for the condemnation of land for public use, instituted by a corporation, from the State to the Federal Court. In the opinion delivered by Mr. Justice Field the passage before cited, from the case of Gaines vs. Fuentes, is quoted approvingly. The opinion at pages 406 and 407 says:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of *an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms.* But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner* vs. *Halloran*, 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question,

and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the Federal court, if the controversy was between the company and a citizen of another state, cannot be doubted. And we perceive no reason against the tranfer of the pending case that might not be offered against the transfer of the case supposed."

In the Boom Co. vs. Patterson, the District Court on the appeal acted as a court of justice, as a judicial court exercising its proper jurisdiction. The case became a suit at law authorized by a statute. The commissioners in making their inquest of value did not act as a court. Their finding or judgment did not deprive the defendants of their property. No process issued to enforce it. If not accepted by the parties the matter must necessarily go into a court where a judgment had all the attributes of the judgments of courts of justice, and operated to deprive the defendant of his property whether he was willing or not. In the District Court a jury trial could be had. It is said in the same opinion on page 404:

"Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, *which is subject to review by the Supreme Court of the state on a writ of error.*"

In the Pacific Railroad Removal Cases, (115 U. S. 18,) the doctrine laid down in the Boom Co. vs. Patterson, in reference to the removal of cases involving the right of eminent domain, was approved and applied.

Under the West Virginia act (chap. 52 of acts of 1883 amending section 67 of chap. 29 of the code of West Virginia), as before stated, the sole question, before either the Board of Public Works or the circuit court on appeal, is the *value* of the property. The proceedings are a mere inquest of value and nothing more. The decision of the Board is as final and conclusive as that of the court, if not appealed from within the prescribed time. The same proceedings are taken by the auditor after the board decides the value as he takes after the court fixes it. The judgment of the court is not enforced by

any process. It takes no property or money. It is a mere inquest of value in a tax proceeding. The proceeding in the court is not a suit in equity. No jury can be impanneled to try any question, and, as stated, the judgment has not the effect of one by a court of law in an action therein. After the court renders judgment in the assessment proceeding, the effect of it can be wiped away by a legislative enactment. The finding of the court has not the sanctity of a judgment or decree of a court of justice. Why could not the legislature of West Virginia give a further appeal from the decision of the circuit court to a tax tribunal composed of county assessors? The act says the "said board shall proceed to assess and fix the fair cash *value* of all the property of said corporation." Again, "in ascertaining such *value* the board shall consider any return," &c. Again it is provided that the corporation aggrieved may appeal from the decision of the board, not on all matters or questions decided, but solely "as to the the *assessment and valuation* made," &c. Assessment and valuation in this statute are synonymous terms. What can the circuit court do in such appeal matter? This is answered by the following language of the statute:

"And if the court be satisfied that the *value* so fixed is correct, it shall confirm the same; but if it be satisfied that the *value* so fixed by said board is either too high or too low, the court shall correct the *valuation* so made and ascertain and fix the true *value* of such property according to the facts proved, and certify such *value* to the auditor."

The circuit court is *functus officio* as soon as it has certified its conclusions on the question of *value* to the auditor. It can do nothing more.

That this is not a suit at law or in equity is further shown by the difficulty which beset the counsel for the company in determining whether the proper course was to pray an appeal or a writ of error, to bring the order remanding the case to the state court, before this court. Unable to solve this problem they prayed both an appeal and writ of error.

THE MATTER IN DISPUTE, EXCLUSIVE OF COSTS, DOES NOT EXCEED $500.

Judge Dillon in his work on Removal of Causes, page 62, says in speaking of value:

"This language, as well as that which precedes it, is descriptive of the nature of the *suits* that may be removed. The subject-matter of the dispute or of the suit must be property, or money, or some right, the value of which in money is susceptible of judicial ascertainment."

In the P. C. & St. L. R.'y Co. vs. Board of Public Works, supra, (28 W. Va. 273,) the Supreme Court of Appeals of West Virginia expressly overrule that portion of one of its previous decisions in which the court held it had jurisdiction of an appeal in a case involving an assessment for taxation, because the amount in controversy exceeded $100.00. In the opinion in 28 W. Va., the court says through Snyder, Judge, in reference to the previous case, i. e. Low vs. County Court, (27 W. Va. 785,) as follows:

"It seems, therefore, that jurisdiction in that case was grounded upon the fact that 'the amount in controversy exceeds $100.00.' This, it seems to me, was an error. It does not appear from the report that any stress was given to the consideration of the question of jurisdiction in that case. It seems to have been assumed that the proceeding was judicial and involved a controversy between parties—that is, that it was a civil action or suit in which more than $100.00 was in controversy. This, I think, was an authorized assumption which led to an erroneous conclusion."

No amount of money is the subject of dispute in this case; no execution can issue upon any judgment, decree, or finding of the state circuit court, and no property changes its possession or title as an effect of the decision of such court. When the collector of taxes attempts to enforce a subsequent levy of taxes, founded upon the valuation of the court, an amount might be in controversy, if the collector should be brought into litigation in relation to such taxes. When, however, the subject matter of the proceedings is a mere assessment of value prior to a tax levy, no amount is in controversy within the meaning of the act of Congress authorizing removals of cases from the state courts to the circuit courts of the United

States. The judgment of the court does not take from the company either the property assessed or its assessed valuation.

IF THIS IS A "SUIT" THE STATE OF WEST VIRGINIA IS A DEFENDANT.

The constitution of West Virginia (Art. VI, sec. 35,) provides:

"Sec. 35. The State of West Virginia shall never be made a defendant in any court of law or equity."

The XI amendment to the constitution of the United States is as follows:

"Art. XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

In the proceedings in this case, if there are any defendants, the State of West Virginia is most vitally interested therein and should be a defendant. The counsel for the company appreciated this and display their uncertainty as to the best way to avoid making the State a defendant on the face of the record, by the different attempts to get a defendant in lieu of the State.

As shown by the portion of the assessment law herein before quoted, "the court shall hear all such legal evidence on such appeal as may be offered by the *state*, county, district or municipal corporation, and by the corporation or company taking such appeal." The auditor, when the assessment is certified to him, assesses and charges the company in a book to be kept by him for the purpose, as follows:

"First. With the whole amount of taxes upon its property for *state* and *state school* purposes."

The state cannot offer evidence if it is not a party, (admitting for the sake of argument that this is a "suit,") and its interest in the result cannot be doubted. If these proceedings can be regarded as a suit brought by the state, when the only possible claim to call

them a "suit" is caused by the appeal taken by the company, still the state, if it instituted the case, is a party and the company is on the other side of the controversy. A state is not a citizen of any state, and the controversy between the Company and the State not being separable from any controversy between the Company and the County of Marshall in this case, the case is not removable. Stone vs. South Carolina, 117 U. S. 430; Cunningham vs. Macon and Brunswick R. R. Co. 109 U. S. 457.

In Stone vs. South Carolina the suit was brought by the State, and it was held:

"There is no statute which authorizes the removal of a suit between the State and citizens on the ground of citizenship, for a State cannot in the nature of things be a citizen of any State."

The first order in this case in the circuit court of the United States is headed:

"UPON AN APPEAL,

THE BALTIMORE & OHIO RAILROAD COMPANY,

vs.

THE BOARD OF PUBLIC WORKS OF WEST VIRGINIA."

The order proceeds to say that the company by its counsel "presented to the court an authenticated copy of the record in the above entitled cause." (See printed record, page 1.)

The only order made by the state circuit court is entitled: "In the matter of an appeal of The Baltimore and Ohio Railroad Company from an assessment by the Board of Public Works of this State." (Printed record, page 2.)

The petition for removal recites in relation to the appeal as follows: "and which said appeal is now pending therein as a suit of a civil nature between your petitioner and the said Joseph S. Miller, auditor as aforesaid, and for the use aforesaid," *i. e.*, for the benefit of the state and the county of Marshall. (Record, page 2.) The bond tendered is payable "to Joseph S. Miller, auditor of the state of West Virginia, and

the county of Marshall," and calls the case "a certain case wherein the said Baltimore and Ohio Railroad Company is plaintiff, and the said Joseph S. Miller, auditor as aforesaid, and the county of Marshall are defendants." (Record, page 3.) In subsequent orders in the Federal circuit court the case is entitled

"THE BALTIMORE AND OHIO RAILROAD COMPANY,

vs.

THE BOARD OF PUBLIC WORKS, &c."

But on motion *of the State* the case is remanded. Record page 4.

The writ of error calls the case one "between the Baltimore and Ohio Railroad Company, complainant, and the Board of Public Works of the state of West Virginia, defendant." (Record, page 5.) The bond given as required by the order remanding the case and granting the writ of error and appeal, is payable to the Board of Public works of the State of West Virginia and recites a suit pending between the Company, complainant, and the said Board. (Record, page 6.) The citation dated August 16th, A. D. 1886, is directed to the Board and recites a suit between the company and the Board. (Record, page 7.) The last citation, issued on October 8, A. D. 1886, is directed to "Joseph S. Miller, auditor of the state of West Virginia, the Board of Public Works of West Virginia and the county of Marshall," and recites a writ of error (which is not in the record and was never allowed,) in a suit wherein the Company is plaintiff in error and they are defendants in error. (Record, pages 7 and 8.)

This record shows the efforts made to hunt up some one to call a defendant in lieu of the State of West Virginia. The appeal to the Marshall circuit court is a statutory proceeding. No such proceeding was known to the common law, which governs the practice in West Virginia. In order to determine

what the proceeding is, the court must read the record in conjunction with the statute authorizing the proceedings. Such statute is to all intents and purposes a part of the record. When the statute is referred to, the impropriety of making either the Board of Public Works of West Virginia, or Joseph S. Miller, auditor, defendant, is conclusively shown. The Board of Public Works is a corporation with no earthly interest in the result of the appeal. It does not collect taxes and the taxes levied upon its assessment of values are not the property or money of the Board. As soon as the Board has rendered its decision on the question of value it is *functus officio*. There would be as much propriety in making the U. S. Circuit Court for West Virginia the defendant in error in this court, as the Board of Public Works defendant in the court below and here on appeal and writ of error. This matter seems too plain to require further argument.

There was as little authority for calling the auditor defendant in these procedings. His duty is entirely ministerial. When he has laid the returns filed with him before the Board and the Board has proceeded to fix the values, he has no further duty to perform or interest in the matter until the decision of the Board, or of the court on appeal, is certified to him. He has no interest in the assessment or taxes. If this was a suit in equity to enjoin some action by him or a proceeding to compel him to do some act, there would be reason for making him a defendant, but there seems to be none in this case, except a desire to avoid making the State a defendant.

The taxes of the county of Marshall and of the State of West Virginia are both levied upon the same assessment. No issue, which can affect the county in this proceeding, can be made, which will not equally affect the state. The state and county cannot be separated and the proceedings removed as to the county without equally removing them as to the State.

If this case is to be regarded as a suit brought by the State or the State and county, then under the authority of Stone vs.

South Carolina, supra, the United States courts have no jurisdiction thereof; and, if it is to be regarded as a suit brought by the Company against the State, or the State and county, then there is still no jurisdiction thereof in such courts, as the suit is within the prohibition of the XIth Amendment to the Constitution of the United States. Hagood vs. Southern, 117 U. S 52.

THERE WAS NO SUIT PENDING WHEN THE REMOVAL WAS ATTEMPTED.

The record shows, on pages 3 and 4, that "no notice, summons or rule against any party interested in said appeal," had ever been given, issued or served upon any person, corporation or body politic interested in the assessment or appeal, when the case was attempted to be removed. A petition was offered to be filed praying the removal and with no one before the court and no one notified of there being such proceedings pending, the removal was attempted.

Parties in interest are entitled to be heard in the state court on the question whether or not the petition for removal shows on its face a case in which the petitioner has a right to the transfer. Stone vs. South Carolina, supra.

If they have a right to be so heard they must be brought in some way before the state court to enable them to avail themselves thereof, before a removal can take place. It is contended that the attempted removal in this case was at least premature.

Respectfully submitted.

ALFRED CALDWELL,

Attorney General of West Virginia,

Counsel for the State of West Virginia, JOSEPH S. MILLER, auditor, the Board of Public Works of West Virginia and the County of Marshall.